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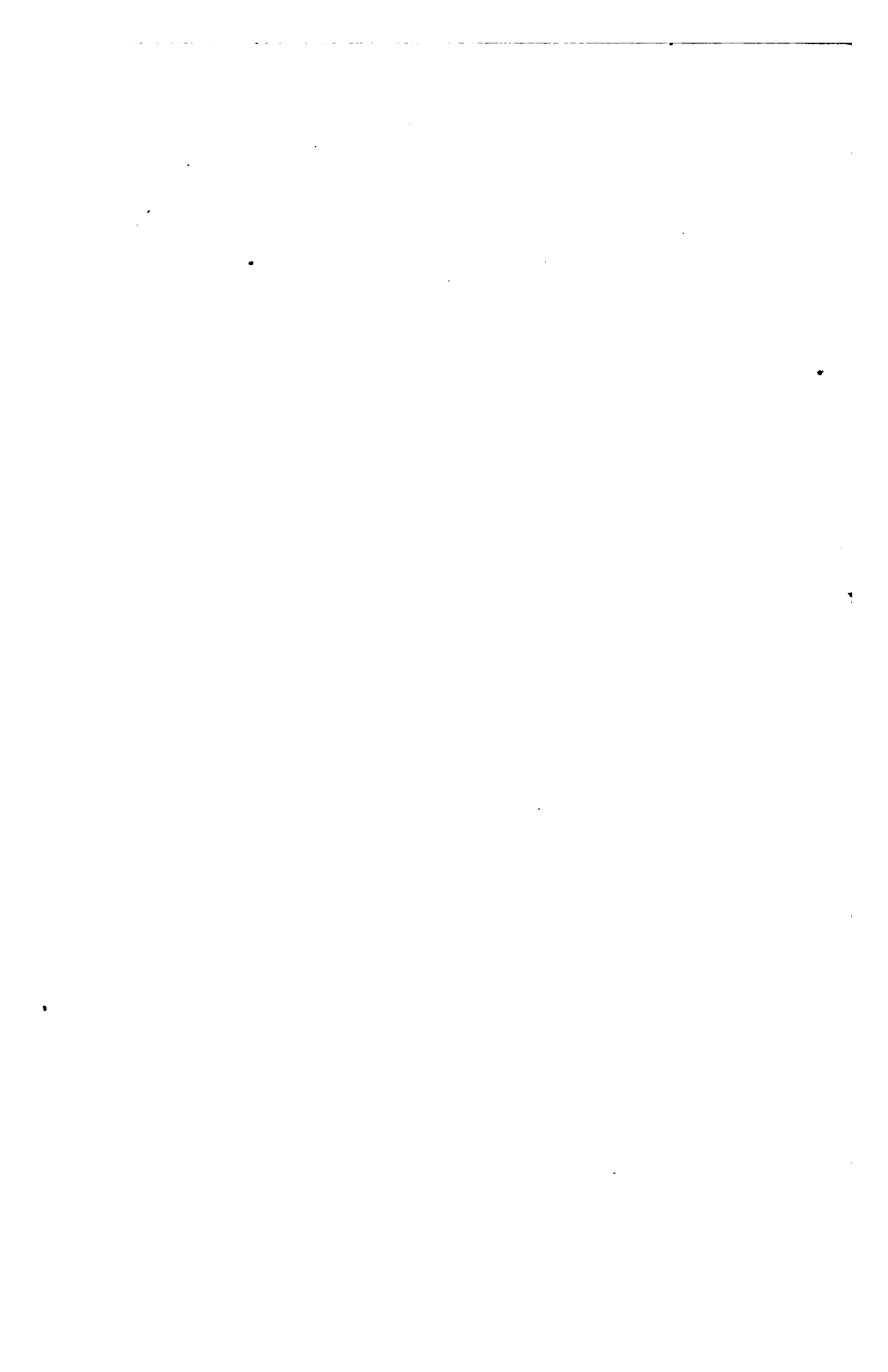
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A TREATISE  
ON  
ATTORNEYS AT LAW

BY  
EDWARD M. THORNTON  
      

In Two Volumes

VOLUME I

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NORTHPORT, LONG ISLAND, N. Y.  
EDWARD THOMPSON COMPANY

1914

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## FOREWORD

**T**HIS is a posthumous work. The author, Mr. Edward M. Thornton, died while writing the last chapter. The subject was one which attracted him, and if he had lived to see the work through the press, his prefatory comments on the undertaking and the law as developed by the decisions would have proved a substantial addition to the book.

Mr. Thornton's style as shown by these pages is clear and condensed. His mind quickly grasped the points determined by the authorities. Analytical and logical arrangement came to him naturally. He was possessed of great industry, and was determined to devote himself to the books of his profession. Had he lived the literature of the law would have been enriched by other valuable contributions from the pen of this sound lawyer.

The final chapter dealing with suspension and disbarment was revised and completed by Mr. Hiram Thomas of the New York bar. Mr. Thomas brought to this task a special fitness acquired by a long association with the work of the committee on discipline of the New York County Lawyers Association. The publishers are indebted to Mr. Walter A. Shoemaker for making a collection of the very recent cases and attending to the appropriate distribution of them throughout the author's manuscript. The index was prepared by Mr. H. Noyes Greene.

THE PUBLISHERS.



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# ATTORNEYS AT LAW

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## VOLUME I

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### CHAPTER I.

#### INTRODUCTION.

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##### *Historical.*

§ 1. The Advocates of Ancient Greece. — The early Grecian litigants were obliged to conduct their trials in person, the Attys. at L. Vol. I.—1.

aid of advocates being deemed to have an undue weight with the judges. They were, however, permitted to consult experts in the law, and these experts, it seems, might write arguments which their patrons could memorize and deliver. At a later period the advocate was allowed to appear for his client, but there was no abridgment of the rights of either party to the suit. Every opportunity was afforded the offender properly to present his side of the issue without being permitted to take any advantage of his opponent. Poor and rich, ignorant and learned, honest and dishonest, were placed on an equal footing before their tribunals. It was the case rather than the persons upon whom the court passed judgment. After Solon's time Greece developed some famous advocates, or pleaders as they were then termed, acting either as prosecutors for the state, in defense of the accused, or in civil suits.<sup>1</sup>

§ 2. The Roman Cognitors, Procurators, and Advocates. — A suitor was obliged, under the old Roman laws, to appear personally in court in his litigation, the aid of others being denied excepting in those actions which concerned the entire community, or which involved questions of personal liberty, or guardianship. When the inconvenience of this system became apparent parties were allowed to seek and receive the aid of a cognitor who might advocate or defend their causes. Later, procurators were permitted to conduct litigation in the name of their principals.<sup>2</sup> "The term *advocatus* was not applied to a pleader in the courts until after the time of Cicero. Its proper signification was that of a friend who, by his presence at a trial, gave countenance and support to the accused. It was always considered a matter of the greatest importance that a party who had to answer a criminal charge should appear with as many friends and partisans as possible. This array answered a double purpose, for by accompanying him they not only acted as what we should call witnesses to character, but by their numbers and influence materially affected the decision of the tribunal. Not unfrequently (when some noble Roman who had gained popu-

<sup>1</sup> Scott's *Evolution of Law* (3d ed.), p. 116.

<sup>2</sup> Forsyth's *Hortensius*, p. 87; *Inst. Just.* (Sandars), p. 469.

larity in his provincial government had to defend himself against an accusation) an embassy of the most distinguished citizens of the province was sent to Rome to testify by their presence to his virtues, and deprecate an unfavorable verdict. Thus when Cicero defended Balbus he pointed to the deputies from Gades, men of the highest rank and character, who had come to avert, if possible, the calamity of a conviction. Although in this point of view the witnesses who were called to speak in favor of the accused might be called *advocati*, the name was not confined to such, but embraced all who rallied round him at the trial.”<sup>3</sup>

§ 3. The Jurisconsults. — In addition to the advocates who appeared in the courts, another class of lawyers, known as jurisconsults, became established in Rome. It was their privilege to expound the law for the benefit of their fellow citizens, and it is said that their houses were so frequented that they were styled the oracles of the state. “They contented themselves with the reputation which they gained as lawyers, to whom their fellow citizens might resort with confidence for advice, or devoted themselves to the study of law, for the sake of the emoluments they were thereby enabled to acquire; for although there can be no doubt that in the majority of cases their opinions were given gratuitously, as a means of gaining popularity and influence, there seems to have been no law against their being paid by fees, which applied only to advocates; and in this respect they resembled the rhetoricians of Athens, who, as we have seen, composed speeches for litigant parties, and by that means earned a livelihood.” As a knowledge of the *jus civile* was possessed by few, the adepts in its mysteries seem to have had a sufficiently good opinion of themselves, and to have plumed themselves not a little on their black-letter lore. Cicero, however, ridicules their pretensions, and in his speech in defense of Murena says that three days are sufficient to master this kind of learning. “If, therefore, you put me on my mettle, overwhelmed with business as I am, I will in three days declare myself a jurisconsult.”<sup>4</sup>

<sup>3</sup> Forsyth's *Hortensius*, p. 86.

See also Ferriere's *Roman Law*, pp.

<sup>4</sup> Forsyth's *Hortensius*, pp. 87-89. 48-50.

§ 4. In England.—In ancient England, as in Greece and Rome, suitors were at one time obliged to conduct their litigation in person.<sup>5</sup> At a very early period, however, it seems that the courts had the power to permit litigants to appear by a representative, and also the right to name such representative;<sup>6</sup> but, be that as it may, it is certain that it became customary to obtain the King's writ commanding the courts to permit the person in whose favor the writ issued to appear by an attorney named therein; and ultimately statutes were enacted under which all persons had the privilege of appearing in court by attorneys appointed by themselves.<sup>7</sup> The first act of this character seems to have been the statute of Westm. 2, c. 10.<sup>8</sup> As this liberty soon became abused, by the appointment of ignorant attorneys, the statute of 4 Hen. IV, c. 18, was enacted in the year 1402; it is entitled "The punishment of an attorney found in default," and in these words: "Item.—For sundry damages and mischiefs that have ensued before this time, to divers persons of the realm, by a great number of attorneys, ignorant and not learned in the law, as they were wont to be before this time, it is ordained and established, that all the attorneys shall be examined by the justices, and by their discretion their names put upon the roll; and they that be good and virtuous, and of good fame, shall be received, and sworn well and truly to serve in their offices; and, especially, that they make no suit in a foreign country; and the other attorneys shall be put out by the discretion of the said justices; and that their masters, for whom they were attorneys, be warned to take others in their places, so that in the meantime no damage or prejudice come to their said masters; and if any of the said attorneys do die, or do cease, the justices for the time being, by their discretion, shall make another in his place, which is a virtuous man, and learned, and sworn in the same manner as afore is said. And if any such attorney be hereafter notoriously found in

<sup>5</sup> 3 Bl. Com. 25. See also *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314; *Harshey v. Blackmarr*, 20 Ia. 161, 89 Am. Dec. 520.

<sup>6</sup> In re Burr, 1 Wheel. Crim. (N. Y.) 503.

<sup>7</sup> *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314; *Harshey v. Blackmarr*, 20 Ia. 161, 89 Am. Dec. 520; In re Burr, 1 Wheel. Crim. (N. Y.) 503.

<sup>8</sup> 3 Bl. Com. 26.

any default, of record or otherwise, he shall forswear the court, and never after be received to make any suit in any court of the King. And that this ordinance be holden in the exchequer, after the discretion of the treasurer and of the barons there.”<sup>9</sup>

§ 5. **Barristers and Solicitors.** — Lawyers in England are divided into two grades—barristers and solicitors. The business of the solicitor is to carry on the practical and more mechanical part of a suit, while it rests with the barrister to review and correct the pleadings, and manage the cause on the trial.<sup>10</sup> The office of solicitor is almost entirely regulated by statute now,<sup>11</sup> but barristers are “called to the bar” by some one of the four inns of court. The “inns” are voluntary unincorporated societies of equal rank and status, independent of the state, which have similar constitutions, and are bound by the same rules; they are outside the jurisdiction of the courts, but are subject to the visitatorial jurisdiction of the judges. Their origin is not certain.<sup>12</sup>

“In the inns of court as now constituted there are three ranks of members, namely, students, barristers, and benchers. The benchers are the governing body, who alone have power to fill up vacancies in or to add to their own number, to admit persons as students, to call students to the bar, and to exercise a disciplinary jurisdiction over the members of the society. While the four inns are independent of each other, they act together in matters affecting their common interest. No person who has been expelled from one of the inns is admitted a member of any of the others. The four inns have agreed on certain regulations which govern the admission of students and the calling of barristers; they have founded and provide funds for the council of legal education, which makes provision for the instruction and examination of students in law, and to which the inns have delegated the task of testing the intellectual fitness of students desiring to be called

<sup>9</sup> *In re Burr*, 1 Wheel. Crim. (N. Y.) 503. See also *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

<sup>10</sup> 1 Kent's Com. 307.

<sup>11</sup> Halsbury's Laws of England title “Solicitor.”

<sup>12</sup> 2 Halsbury's Laws of England, 358. See also *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

to the bar. The benchers of each inn decide all questions relating to the fitness, other than intellectual, of students to be called, and exercise a disciplinary power over all their members. They can refuse to admit a person as student, or to call a student to the bar. They can expel any member, and can disbar a barrister and disbench one of their own number. The property of each inn is vested in trustees, appointed out of their number, and is managed solely by the benchers. They, too, decide on the amount of the fees which the members of the inn have to pay, and on the application of the moneys so raised. In all these matters they are entirely outside the jurisdiction of the ordinary courts, but their decisions are subject to an appeal to the lord chancellor and the judges of the high court of justice, sitting as a domestic tribunal. A barrister must, so long as he is in practice, continue to be a member of an inn of court."<sup>13</sup> The King's counsel are appointed from among the barristers.<sup>14</sup>

§ 6. In the American Colonies. — During colonial times it seems that lawyers were appointed by the governor of each colony, who usually took the advice of the chief justice of the supreme court in this respect,<sup>15</sup> and that they assumed the powers and privileges which were exercised by the legal profession of the mother country, and some of which that country did not approve, is amply demonstrated by the law reports of those times, and the history of our own country. In colonial Virginia, however, lawyers were, for a short period, forbidden to practice their profession. Mr. Minor, speaking of this matter in his *Institutes*, says: "Our colonial ancestors seem to have cherished bitter prejudices against professional lawyers, the reasons of which, if indeed any existed, it is vain at this distance of time to explore. It may have been only the unrestrained exhibition of that sentiment of jealous dislike which is pretty sure to animate an aristocracy of birth and fortune, in respect to the opposing aristocracy of capacity and learning; a jealousy and dislike which has many times flamed out in England against the new barons and earls who, by eminence

<sup>13</sup> 2 Halsbury's Laws of England, 361.

<sup>15</sup> *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314.

<sup>14</sup> 3 Bl. Com. 27, 28.

in the legal profession, have been raised to the peerage." The earliest manifestation of suspicious aversion occurs in 1642, when an act was passed, "for the better regulating attorneys, and the great fees exacted by them," by which it was declared that it should be "not lawful to plead for another without license from the court where he pleadeth, and can have license only in the quarter court (held by the governor and council at the seat of government) and one county court." In June, 1680 (32 Car. II) the struggling fraternity, which certainly exhibited wonderful tenacity of life, again for a brief space got their heads above water, as appears by the following law: "Whereas, all courts in this country are many tymes hindred, and troubled in their judicall proceedings by the impertinent discourses of many busy and ignorant men, who will pretend to assist their friend in his busines; and to cleare the matter more plainly to the court, although never desired nor requested there unto by the person whome they pretend to assist, and many tymes to the destruction of his cause, and to the great hindrance and trouble of the courte," therefore lawyers shall be licensed by the "governour." 2 Hen. Stats. 478. In 1682 (34 Car. II), however, they were gotten under again: "Nov. 1682: Forasmuch" as this last act of 1680 "is found inconvenient," it is repealed. 2 Hen. Stats. 498. "For thirty-six years after this apparent extinction of the profession, no legislation appears to have occurred upon the subject. The craft, however, seems to have lived and flourished; the necessities of society proving more than a match for the stolidity of the 'grand assembly,' so that that body, abandoning at length the vain design of suppressing it, betook itself to the not less futile attempt to regulate the charges of the profession. Thus, in April, 1718 (4 Geo. I) the attorney's fee in the general court (formerly the quarter court held by the governor and council) was fixed at fifty shillings, or five hundred pounds of tobacco; and in the county court at fifteen shillings, or one hundred and fifty pounds of tobacco. 4 Hen. Stats. 59. Thenceforward no further illiberality was manifested towards the legal profession."<sup>16</sup>

<sup>16</sup> 4 Minor's Inst. 163-168. See also Bar," by William Romaine Tyree in article entitled "The Early Virginia Vol. 20 Green Bag, pp. 356-357.

§ 7. *The Honorarium.* — In ancient times, in every country where advocacy was known, the labor of the advocate was looked upon as purely honorary; and, indeed, the pleading of another's cause in those days was, in all probability, not much more than the intercession of one for his neighbor for which no compensation was expected. But as actions multiplied, and a knowledge of legal rights and liabilities became more difficult, and more time and study were required to qualify a citizen to undertake the cause of another, the natural and inevitable consequence was that those who applied themselves to the acquisition of the necessary learning employed it as a means of obtaining money. This, however, was deemed to be an abuse, and laws were enacted which forbade, restricted, or regulated the compensation of advocates, or confined them to such *honorarium*, that is, gift or gratuity, as the client might choose to give them voluntarily.<sup>17</sup> But even in those early days some advocates grew wealthy on their *honorariums*, and there were also men learned in the law, other than advocates, as, for instance, the rhetoricians and the jurisconsults, to whom compensation might properly be paid. The only vestige of the *honorarium* now to be found is that which, in theory at least, exists in England, and to some extent in the state of New Jersey.<sup>18</sup> While the English solicitor not only can claim and recover compensation, but receives fees which are regulated by statute, and taxed in the cause,<sup>19</sup> the barrister cannot contract for, or recover, fees for his services. He can only accept an *honorarium*, and this has always been so in England.<sup>20</sup> "In the time of King Alfred the barrister was an employee of the court, and it was his business to get the facts and explain them to the King in the fewest words. If a barrister accepted a fee from a man suing for justice, he was disbarred. Finally, however, the practice of feeing, in order to renew the zeal of the barrister, was tolerated, but clients had to slyly slip all gratuities, as they were called, into the pocket of the barrister. The general practice of paying the barrister, instead of the court, was not adopted till several hundred years later,

<sup>17</sup> Forsyth's *Hortensius*, pp. 362, 363.

<sup>19</sup> Halsbury's *Laws of England*, title "Solicitor."

<sup>18</sup> The *New Jersey* rule has been considered *infra*, § 405.

<sup>20</sup> 3 Bl. Com. 28, 29.



and it was then regarded as an expeditious move to allay litigation and punish the client for not settling his own troubles.”<sup>1</sup> So, to this day, “the employment of a barrister is a purely honorary one in the sense that it confers on him no legal right to remuneration for his services; hence the remuneration of a barrister is called *honorarium*, as opposed to *merces*. . . . An express promise by the client himself to pay fees to counsel for his advocacy, whether made before or during or after the litigation, has no binding effect. The relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. The requests and promises of the client and the services of counsel create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise.”<sup>2</sup> These theories, for such they are, have been criticised and discarded in the United States generally,<sup>3</sup> and in Canada.<sup>4</sup>

**§ 8. Bill of Privilege.** — An ancient English doctrine extended to practicing lawyers generally, as officers of the court, a privilege from arrest or suit by ordinary process, and it was necessary to sue them by bill, usually called a bill of privilege, in the court wherein they practiced, on the theory that they were always supposed to be in attendance there, and that the business of the court or the suitors therein would suffer by counsel being drawn into any court other than that in which their personal attendance was required.<sup>5</sup> Nor could an attorney waive or destroy this privilege, because it was allowed to him, not for his own sake, but for the sake of the court and litigants generally,<sup>6</sup> excepting by having his name stricken from the roll.<sup>7</sup> In New York, though, where this procedure was in effect for a time, it was held that the privilege was lost, or rather that it did not exist, where an attorney was

<sup>1</sup> Scott's *Evolution of Law*, pp. 137, 138.

<sup>2</sup> 2 Halsbury's *Laws of England*, 392.

See also *infra*, § 401.

<sup>3</sup> See *infra*, §§ 402, 404.

<sup>4</sup> See *infra*, § 403.

<sup>5</sup> 3 Bl. Com. 289; Bac. Abr. tit. "Privilege."

<sup>6</sup> *Gardner v. Jessop*, 2 Wils. C. Pl. (Eng.) 42; *Farrill v. Head*, Barnes N. Cas. (Eng.) 41.

<sup>7</sup> See *Scott v. Van Alstyne*, 9 Johns. (N. Y.) 216.

sued jointly with a "common person."<sup>8</sup> This doctrine, however, obtained no general acceptance in the jurisprudence of this country; it was recognized to a limited extent in a few states in the beginning, but it soon disappeared entirely.<sup>9</sup> Nor could it be expected that a privilege of such nature and extent could continue to exist in the light of American institutions. But out of the common-law rule it has become firmly established in our courts that "all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the court."<sup>10</sup> Necessarily, if not primarily, this immunity extends to attorneys representing their clients before the court, so that they may not be drawn into other courts, or to other business, to the injury of suitors, but the privilege is that of the court, and is allowed for the sake of public justice, not as an accommodation to the individual.<sup>11</sup>

<sup>8</sup> *Gay v. Rogers*, 3 Cow. (N. Y.) 368; *Chenango Bank v. Root*, 4 Cow. (N. Y.) 126.

<sup>9</sup> See Anonymous, 20 N. J. L. 494; *In re Emmet*, cited in *Godwise v. Hacker*, 2 Cai. (N. Y.) 386; *Sheldon v. Cumming*, 1 Cow. (N. Y.) 168; *Lawrence v. Warner*, 1 Cow. (N. Y.) 198; *Wood v. Gibson*, 1 Cow. (N. Y.) 597; *Colt v. Gregory*, 3 Cow. (N. Y.) 22; *Walsh v. Sackrider*, 7 Johns. (N. Y.) 537; *Backus v. Rogers*, 8 Johns. (N. Y.) 346; *Scott v. Van Alstyne*, 9 Johns. (N. Y.) 216; *Webb v. Cleveland*, 9 Johns. (N. Y.) 266; *Bridgeport Bank v. Sherwood*, 16 Johns. (N. Y.) 43; *Brown v. Childs*, 17 Johns. (N. Y.) 1; *King v. Burr*, 20 Johns. (N. Y.) 274; *Wells v. Cruger*, 5 Paige (N. Y.) 164; *Van Alstyne v. Dearborn*, 2 Wend. (N. Y.) 586; *Hitchcock v. Barlow*, 2 Wend. (N. Y.) 629.

<sup>10</sup> *In re Healey*, 53 Vt. 694, 38 Am. Rep. 713 and notes page 717.

<sup>11</sup> *United States*.—*Blight v. Fisher*, Pet. (C. C.) 41, 3 Fed. Cas. No. 1, 542; *Ex p. Hurst*, 4 Dall. 387, 12 Fed. Cas. No. 6,924; *Parker v. Hotchkiss*, 1 Wall. Jr. (C. C.) 269, 18 Fed. Cas. No. 10,739; *Bridges v. Sheldon*, 7 Fed. 36; *Miner v. Markham*, 28 Fed. 387; *Central Trust Co. v. Milwaukee St. R. Co.* 74 Fed. 442. *Massachusetts*.—*In re McNeil*, 3 Mass. 287.

*Minnesota*.—*Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L.R.A. 632.

*New Jersey*.—*Halsey v. Stewart*, 4 N. J. L. 420.

*New York*.—*Brooks v. Patterson*, 2 Johns. Cas. 102; *Humphrey v. Cumming*, 5 Wend. 90.

*Pennsylvania*.—*Starret's Case*, 1 Dall. 356, 1 U. S. (L. ed.) 174.

*Virginia*.—*Com. v. Ronald*, 4 Call 97.

*Wisconsin*.—*Anderson v. Roundtree*, 1 Pin. 115.

The privileges and exemptions of attorneys generally will be considered later.<sup>12</sup>

*Definitions and Distinctions.*

§ 9. Signification of Word "Attorney." — The word "attorney," when used in connection with court proceedings, as well as when employed in a general sense with reference to the transaction of business usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification on which the technical and the popular sense unite. The legislator and the judge, the lawyer and the laymen, understand it alike as having reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear, prosecute and defend litigation therein, and upon whom peculiar duties, responsibilities and liabilities are devolved by law.<sup>13</sup> It has been said, however, that the word "attorney" after the name of a principal does not of necessity carry with it the idea that the attorney is an officer of the court or an attorney at law.<sup>14</sup>

§ 10. "Attorney at Law" Defined. — An attorney at law is one who, having satisfied the court as to his educational qualifica-

<sup>12</sup> See *infra*, §§ 72-78.

<sup>13</sup> *United States*.—In *re Paschal*, 10 Wall. 493, 19 U. S. (L. ed.) 996; *Ex p. Hallowell*, 3 Dall. 411, 1 U. S. (L. ed.) 658.

*California*.—*Pittman v. Carstenbrook*, 11 Cal. App. 224, 104 Pac. 699.

*Colorado*.—*People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349.

*Louisiana*.—*Ingram v. Richardson*, 2 La. Ann. 839; *Dwight v. Weir*, 6 La. Ann. 706; *Clark v. Morse*, 16 La. 575.

*Michigan*.—*People v. May*, 3 Mich. 598.

*Oklahoma*.—*Nolan v. St. Louis & S. F. R. Co.*, 19 Okla. 51, 91 Pac. 1128.

*Pennsylvania*.—*Kelly v. Herb*, 147 Pa. St. 563, 23 Atl. 889.

*South Dakota*.—*Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

*Vermont*.—*Heartt v. Chipman*, 2 Aik. 162; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 825.

The terms "attorney ad hoc," "counselor ad hoc," and "advocate," when used with respect to an absent defendant, indicate the person named and appointed by the court to defend him in the suit in which the appointment is made. *Bienvenu v. Factors' & Traders' Ins. Co.*, 33 La. Ann. 209.

<sup>14</sup> *Hall v. Sawyer*, 47 Barb. (N. Y.) 116.

tions and good moral character, is permitted to, and does, take the usual oath of office,<sup>15</sup> as a matter of privilege, and not as a matter of right.<sup>16</sup> It has been aptly said that an attorney is one "set apart by the law to expound to all persons who seek him the laws of the land."<sup>17</sup> He is a necessary part of the judicial system, and he should sit in judgment on every case which is brought to him, and decide for himself whether or not he shall espouse it.<sup>18</sup> Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts.<sup>19</sup>

§ 11. "Practicing Attorney" Defined. — Statutes and court rules frequently use the term "practicing attorney," and occasionally there is some discussion, if not a dispute, as to its meaning. Clearly, a practicing attorney is an attorney at law who is engaged in the practice of his profession, and who holds himself out to the public as being so engaged. It is not necessary that a lawyer should be ready to serve all who may wish to employ him in order to come within the meaning of the term "practicing attorney;" no lawyer is obliged to do this, and many are retained by one client only, others by a small number of clients, or none at all, nevertheless they are practicing attorneys if, in fact, they hold themselves out as such, and are members of the bar. Therefore,

<sup>15</sup> *Sample v. Frost*, 10 Ia. 266. See also *People v. Hallett*, 1 Colo. 352; *Martine v. Lowenstein*, 68 N. Y. 456; *National Press Intelligence Co. v. Brooke*, 18 Misc. 373, 41 N. Y. S. 658.

<sup>16</sup> *O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597.

And see also *infra*, § 21.

<sup>17</sup> *Planter's Bank v. Hornberger*, 4 Coldw. (Tenn.) 531.

<sup>18</sup> *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519. See also *Dodge v. State*, 140 Ind. 284, 39 N. E. 745; *State v. Russell*, 83 Wis. 330, 53 N. W. 441.

<sup>19</sup> *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621. And see also *infra*, §§ 312-315.

the term under consideration can have no useful signification other than to distinguish between those who are engaged in practice, and those who have retired therefrom. Thus, it has been held that a "practicing attorney" within the meaning of a statute exempting all practicing attorneys from jury duty does not include a person who has a license as an attorney, but who does not follow the business of practicing law as his vocation or calling, although he may frequently attend to suits before magistrates on matters connected with his other business.<sup>20</sup> Nor does a retired lawyer who conducts a suit in court for a friend or neighbor, without fee or reward, come within the meaning of a statute prohibiting a lawyer from practicing without first having obtained a privilege tax license.<sup>1</sup> Nor is an attorney who does not practice his profession within the meaning of a statute prohibiting attorneys from buying claims with the intention of bringing actions thereon,<sup>2</sup> or within the meaning of a statute prohibiting an attorney from becoming a surety upon a bond.<sup>3</sup> In these days, however, the practice of law is not limited to the conduct of cases in courts, but it embraces the preparation of pleadings, and all other papers incident to actions at law, suits in equity, and special proceedings, and also the management of such actions, suits and proceedings on behalf of clients before judges and courts; and, in addition thereto, it includes conveyancing, the preparation of legal instruments of all kinds, and in general, all advice to clients, and all action taken for them in matters connected with the law.<sup>4</sup> Courts will not take judicial notice of who are practicing attorneys,<sup>5</sup> and it has been held that an allegation that one is a "practitioner" in all the courts of the state does not show that he has a legal right so to practice.<sup>6</sup>

<sup>20</sup> *Wheatley v. State*, 11 Lea (Tenn.) 262.

<sup>1</sup> *McCargo v. State*, (Miss.) 1 So. 161.

<sup>2</sup> *Thompson v. Stiles*, 44 Misc. 334, 89 N. Y. S. 876.

<sup>3</sup> *Evans v. Harris*, 47 Super. Ct. (N. Y.) 366; *Stringham v. Stewart*, 3 Civ. Pro. (N. Y.) 420.

<sup>4</sup> *In re Duncan*, 83 S. C. 186, 18 Ann. Cas. 657, 65 S. E. 211, 24 L.R.A. (N.S.) 750.

<sup>5</sup> *Cothren v. Connaughton*, 24 Wis. 134.

<sup>6</sup> *Withers v. State*, 36 Ala. 252.

§ 12. Compared with Other Vocations. — An attorney at law is a special agent limited in duty and authority to the vigilant prosecution or defense of the rights of his client. But his authority to enter into bargains or contracts binding on his client, unless expressly conferred, is confined within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of pending suits, and of direction to ministerial officers in the issue, levy, and return of executions on judgments which he may have obtained. He is invested with a large discretionary power in anything pertaining to the collection of demands intrusted to him for that purpose; and while he cannot discharge a debt or an execution without receiving satisfaction, he has control of the selection of legal remedies and processes which he may deem most effectual in accomplishing his object. The confidence reposed in him by his client, and the supposed ignorance of the latter as to the most appropriate remedies, require this.<sup>7</sup> It has also been held that an attorney is an employee or laborer within the meaning of an order appointing a receiver for a railroad company, and directing him to pay debts owing to the laborers and employees of the company for labor and services actually done in connection with the company's railways.<sup>8</sup> But an attorney is not a "clerk, servant, or employee" within the meaning of a statute which entitles such persons to priority of payment for services over other creditors of an insolvent corporation in the hands of a receiver.<sup>9</sup>

§ 13. Attorney as Officer of Court. — Attorneys are officers of the courts wherein they are admitted to practice,<sup>10</sup> and, as such, are accorded certain privileges for the benefit of the general

<sup>7</sup> Robinson v. Murphy, 69 Ala. 543; Shattuck v. Bill, 142 Mass. 56, 7 N. E. 39; Douglass v. Folsom, 21 Nev. 441, 33 Pac. 660; Ricker's Petition, 66 N. H. 207, 29 Atl. 559, 24 L.R.A. 740. See also Dick v. State, 107 Md. 21, 68 Atl. 286, 576.

The general authority of attorneys at law is considered *infra*, §§ 199-283.

<sup>8</sup> Gurney v. Atlantic, etc., R. Co. 58 N. Y. 358.

<sup>9</sup> Lewis v. Fisher, 80 Md. 139, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L.R.A. 278.

<sup>10</sup> United States.—Ex p. Garland, 4 Wall. 333, 18 U. S. (L. ed.) 366; In re Wall, 13 Fed. 814; Treat v. Tolman, 113 Fed. 892, 51 C. C. A. 522; In re Alexander, 193 Fed. 749.

public, not for their own advantage. By approved practice, and *ex necessitate*, an attorney at law is clothed in some measure with the court's power. For instance, his engagement in a case gives him the right to command the court's processes of summons and subpoena, and the court's officers are at his call to execute his will in behalf of his client for many purposes. His retainer gives him the ear of the court, and also affords him the court's protection against a refractory client. He is the only proper vehicle of communication between the court and his client, and upon him the court must rely for the performance of many intimate and responsible duties. These and other considerations suggest that to call him an officer of the court is by no means a figure of speech.<sup>11</sup> He is also bound to respect and obey the court, and to aid it in the due administration of justice, and for the failure so to do, or for any

*California*.—Clark v. Willett, 35 Cal. 534.

*Colorado*.—People v. Hallett, 1 Colo. 352.

*Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Illinois*.—In re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

*Indiana*.—Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281.

*Kansas*.—In re Pryor, 18 Kan. 72, 26 Am. Rep. 747; Hanson v. Grattan, 84 Kan. 843, 115 Pac. 646, 34 L.R.A. (N.S.) 240.

*Michigan*.—Williams v. West Bay City, 119 Mich. 395, 78 N. W. 328; In re Mains, 121 Mich. 603, 30 N. W. 714.

*New Jersey*.—In re Young, 75 N. J. L. 83, 67 Atl. 717.

*New York*.—In re Burchard, 27 Hun 429; Matter of Baum, 55 Hun 611 mem., 8 N. Y. S. 771; Matter of Manheim, 113 App. Div. 136, 99 N. Y. S. 87; In re Wood, 2 Cow. 29  
'note b, Hopk. 6; Hall v. Sawyer, 47

Barb. 116; Neele v. Berryhill, 4 How. Pr. 16; Close v. Gillespey, 3 Johns. 526.

*Oklahoma*.—Nolan v. St. Louis, etc., R. Co., 19 Okla. 51, 91 Pac. 1128.

*Pennsylvania*.—In re Austin, 5 Rawle 191, 28 Am. Dec. 657; Danville, etc., R. Co. v. Rhodes, 180 Pa. St. 157, 36 Atl. 648; In re Murray's Estate, 13 Pa. Co. Ct. 70; Com. v. Branthoover, 24 Pa. Co. Ct. 353.

*South Carolina*.—State v. Holding, 1 McCord L. 379.

*Texas*.—Harkins v. Murphy, 51 Tex. Civ. App. 568, 112 S. W. 136.

*Utah*.—Morrison v. Snow, 26 Utah 247, 72 Pac. 924.

*West Virginia*.—State v. Hansford, 43 W. Va. 773, 28 S. E. 791.

*Wisconsin*.—Vernon County Bar Assoc. v. McKibbin, 153 Wis. 350, 141 N. W. 283.

Attorneys are not officers of courts not of record. In re Hunt, Tuck. (N. Y.) 55.

<sup>11</sup> In re Thatcher, 190 Fed. 969.

other misconduct which renders him unworthy to occupy his office, his license may be revoked.<sup>12</sup>

§ 14. **As Public Officer.**—It has been held that an attorney at law is a public officer appointed by the court to perform certain public duties, and vested with such power and authority as are necessary for the due performance thereof.<sup>13</sup> It is only in this limited sense, however, that an attorney can be classified as a public officer, for he is not a public official in the ordinary, nor in the strict, signification of that term.<sup>14</sup> It has been held, for instance, that the vocation of a member of the bar, as an attorney and an officer of the court, is not a public office within the common-law rule which excludes women from government by withholding electoral and official power, nor does that rule prevent women from being licensed to practice as attorneys.<sup>15</sup> So, it has been decided that an attorney at law could not be compelled, as a condition precedent to his admission to the bar, to take an anti-duelling oath, although it was required by statute that all persons holding "an office or public trust" should take such an oath;<sup>16</sup> and a like

<sup>12</sup> See *infra*, §§ 756-761.

<sup>13</sup> In *re* Shay, 133 App. Div. 547, 118 N. Y. S. 146; In *re* Spencer, 137 App. Div. 330, 122 N. Y. S. 190; In *re* Rothschild, 140 App. Div. 583, 125 N. Y. S. 629. See also *Waters v. Whittemore*, 22 Barb. (N. Y.) 593; *Wood's Case*, 2 Cow. (N. Y.) 29 note b; *Wallis v. Loubat*, 2 Den. (N. Y.) 607; In *re* Wood, 1 Hopk. (N. Y.) 7; *Richardson v. Brooklyn City, etc., R. Co.*, 22 How. Pr. (N. Y.) 368; *Merritt v. Lambert*, 10 Paige (N. Y.) 352.

<sup>14</sup> *United States*.—Ex p. Garland, 4 Wall. 333, 18 U. S. (L. ed.) 366.

*Alabama*.—In *re* Dorsey, 7 Port. 293.

*California*.—*Cohen v. Wright*, 22 Cal. 293; Ex p. Yale, 24 Cal. 241, 85 Am. Dec. 62.

*Georgia*.—Ex p. Law, 35 Ga. 238, 15 Fed. Cas. No. 8,126.

*Massachusetts*.—In *re* Robinson, 131 Mass. 376, 41 Am. Rep. 239.

*Michigan*.—*Hester v. Park, etc., Com'rs*, 84 Mich. 450, 47 N. W. 1097.

*New York*.—In *re* Burchard, 27 Hun 429, *explaining* *Seymour v. Ellison*, 2 Cow. 13.

*South Carolina*.—*Byrne v. Stewart*, 3 Desaus. 466.

*Texas*.—Ex p. Williams, 31 Tex. Crim. 272, 20 S. W. 580, 21 L.R.A. 783.

*Virginia*.—*Bland, etc., County Judge Case*, 33 Gratt. 443; In *re* Leigh, 1 Munf. 468.

And see the following section.

<sup>15</sup> In *re* Thomas, 16 Colo. 441, 27 Pac. 707, 13 L.R.A. 538; In *re* Ricker, 66 N. H. 207, 29 Atl. 559, 24 L.R.A. 740.

See also *infra*, §§ 36-40.

<sup>16</sup> *Matter of Attorney's Oath*, 20



conclusion was arrived at with reference to certain requirements as to the taking of the "test oaths."<sup>17</sup>

**§ 15. As Constitutional and Judicial Officer.** — An attorney at law does not come within the meaning of the term "public officer" as used in the federal and state constitutions;<sup>18</sup> nor is the act of admitting an applicant to the bar an appointment to office within the meaning of a constitutional provision prohibiting judges from exercising the power of appointment to office.<sup>19</sup> And it has also been held that an attorney is not a judicial officer.<sup>20</sup>

**§ 16. "Attorneys at Law" and "Counselors" Distinguished.** — The ancient distinctions which prevailed in England between the various grades of legal practitioners have long since been abolished, and there remains now but the advocate or court lawyer, and the solicitor or office lawyer.<sup>1</sup> So, in this country the distinction between attorneys and counselors disappeared, for practical purposes at least, at a very early period, and these terms are now used interchangeably.<sup>2</sup> In some instances it has been found convenient to refer to associate attorneys as "of counsel" so as to distinguish them from the "attorneys of record" in a cause;<sup>3</sup> and in some jurisdictions a purely arbitrary distinction is made as between proceedings at law or in equity; thus when a member of the bar signs a common-law pleading, he does so as attorney, while

Johns. (N. Y.) 492; *Byrne v. Stewart*, 3 Desaus. (S. C.) 466; *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247; *In re Leigh*, 1 Munf. (Va.) 468. See also *Ex p. Faulkner*, 1 W. Va. 269; *Ex p. Quarrier*, 4 W. Va. 210.

And see *infra*, § 55.

<sup>17</sup> *Ex p. Faulkner*, 1 W. Va. 269.

See also *infra*, § 56.

<sup>18</sup> *Ex p. Williams*, 31 Tex. Crim. 262, 20 S. W. 580, 21 L.R.A. 783. See also *Ex p. Garland*, 4 Wall. 333, 378, 18 U. S. (L. ed.) 366; *In re Bland & Giles County Judge*, 33 Grat. (Va.) 443.

<sup>19</sup> *In re Cooper*, 22 N. Y. 67, 20 Attys. at L. Vol. I.—2.

*How. Pr. 1, reversing 31 Barb. 353, 10 Abb. Pr. 348, 19 How. Pr. 97; In re Graduates*, 11 Abb. Pr. (N. Y.) 301.

<sup>20</sup> *Matter of Baum*, 55 Hun 611 mem., 8 N. Y. S. 771.

<sup>1</sup> See *supra*, §§ 4, 5.

<sup>2</sup> *In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *Law v. Ewell*, 2 Cranch. (C. C.) 144, 15 Fed. Cas. No. 8,127; *Pittman v. Carstenbrook*, 11 Cal. App. 224, 104 Pac. 699; *Allentown v. Light*, 15 Pa. Dist. Ct. 619; *Ingraham v. Leland*, 19 Vt. 304.

<sup>3</sup> *State v. Russell*, 83 Wis. 330, 53 N. W. 441.

he signs a pleading in equity as solicitor; but this distinction arises merely from the mode of proceeding,<sup>4</sup> and not from any difference in the grade, power, or authority of the practitioner in either case. In New Jersey, however, while the same person may be, and usually is, both counselor and attorney, some theoretical distinction is still maintained.<sup>5</sup>

§ 17. "Lawyer" Defined. — The word "lawyer," as used in this country, means an attorney at law; and in England and Canada it embraces both branches of the legal profession, that is, barristers and solicitors, although each of these branches, in so far as their powers and duties are concerned, differs widely from the other. They are in fact, as in name, distinct callings, governed by distinct rules, and subject to different considerations. Nor are the qualities necessary for success in each by any means the same; for it is well known that a man may be a good solicitor although he would make but an indifferent barrister, and *vice versa*.<sup>6</sup>

§ 18. "Client" Defined. — A client is one who retains a member of the bar to advise him in relation to his rights, duties or liabilities under the law; or to transact a matter of legal business, or business in the nature thereof, for him; or to manage, or assist in the management of, his litigation.<sup>7</sup> To become a client there must be an employment of the attorney,<sup>8</sup> although it is not essential that a fee be either paid or promised,<sup>9</sup> for the law will imply a promise to pay for services rendered upon request, or the benefits of which have been knowingly accepted.<sup>10</sup> Whether or not one is a client, or in other words, whether the relation of attorney and client has been established, is of considerable importance in some respects; for instance, an attorney cannot of his own accord divulge information communicated to him in confidence by a client, nor will he be permitted to do so without his client's consent

<sup>4</sup> *Stinson v. Hildrup*, 8 Biss. 376, 23 Fed. Cas. No. 13,459; *Allentown v. Light*, 15 Pa. Dist. Ct. 619.

<sup>5</sup> See *infra*, § 405.

<sup>6</sup> *M'Dougall v. Campbell*, 41 U. C. Q. B. 332.

<sup>7</sup> *McCreary v. Hoopes*, 25 Miss. 428.

<sup>8</sup> What constitutes an employment will be considered *infra*, §§ 507-522.

<sup>9</sup> See *infra*, § 109.

<sup>10</sup> See *infra*, §§ 447-449.

or waiver.<sup>11</sup> So, the existence of the professional relationship is of importance in determining the validity of dealings between the attorney and his client,<sup>12</sup> or whether an attorney has acquired interests adverse to those of his client.<sup>13</sup>

**§ 19. "Attorney in Fact" Defined.** — An attorney in fact is one who is appointed by another to act in his place and stead for the purpose of doing some particular act, or transacting a particular matter of business. All attorneys in fact are merely agents appointed by a writing which specifies their powers, and beyond which they cannot go.<sup>14</sup> Such a writing is known as a "power of attorney," and it can confer on the appointee a right to do only those things which might lawfully have been done by the person making the appointment. But one cannot empower another, not a member of the bar, to manage his litigation in court.<sup>15</sup> An attorney in fact may or may not be also a member of the bar, but private persons are usually appointed for this purpose, and are sometimes called "private attorneys" to distinguish them from attorneys at law. Furthermore, a lawyer may, without a formal appointment, do such a variety of acts in behalf of his client<sup>16</sup> that his appointment by power of attorney becomes necessary only where the act to be performed is one which does not fall within the scope of his official authority, as, for instance, the execution and acknowledgment of written instruments such as deeds, mortgages, releases, and contracts; or the cancelation thereof.<sup>17</sup>

**§ 20. "Attorney of Record" Defined.** — The phrase "attorney of record," though of some practical importance, has never been judicially defined. The attorney of record is that at-

<sup>11</sup> See *infra*, §§ 101, 107. And as to privileged communications generally see *infra*, §§ 92-132.

<sup>12</sup> See *infra*, § 153. And as to dealings between attorney and client generally see *infra*, §§ 152-163.

<sup>13</sup> See *infra*, § 172. And as to the acquisition of adverse interests generally see *infra*, §§ 164-173.

<sup>14</sup> *Treat v. Tolman*, 113 Fed. 892,

51 C. C. A. 522; *Porter v. Hermann*, 8 Cal. 619; *White v. Furgeason*, 29 Ind. App. 144, 64 N. E. 49; *Hall v. Sawyer*, 47 Barb. (N. Y.) 116.

<sup>15</sup> See *infra*, § 25.

<sup>16</sup> As to the authority of attorneys at law generally see *infra*, §§ 199-283.

<sup>17</sup> See *infra*, §§ 199-202.

torney who, by appearance, or by signature of process or pleadings, stands upon the record of the court as the representative of a party litigant. In the absence of litigation there can be no attorney of record.<sup>18</sup> By virtue of his appearance of record he is ordinarily deemed the only authorized representative of the litigant and where a statute requires that notices be signed by<sup>19</sup> or served on the "attorney" of a party, the attorney of record is intended.<sup>20</sup> The substitution of attorneys on the record,<sup>1</sup> the employment of associate attorneys by the attorney of record,<sup>2</sup> and the relative rights of attorneys of record and associate attorneys to a lien,<sup>3</sup> are considered in subsequent chapters.

<sup>18</sup> *Wilson v. St. Louis, etc., R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

<sup>19</sup> *Prescott v. Salthouse*, 53 Cal. 221.

<sup>20</sup> *Whittle v. Renner*, 55 Cal. 395; *Wilson v. St. Louis, etc., R. Co.*, 108

Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

<sup>1</sup> See *infra*, § 143 *et seq.*

<sup>2</sup> See *infra*, § 516.

<sup>3</sup> See *infra*, §§ 585, 586.

## CHAPTER II.

### ADMISSION TO PRACTICE.

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*Necessity of Admission.*

§ 21. **Generally.**—The right to practice law is not a natural inherent right,<sup>1</sup> but one which may be exercised only upon proof of fitness, through evidence of the possession of satisfactory legal attainments and fair character.<sup>2</sup> The privilege of practicing law

<sup>1</sup> *Cohen v. Wright*, 22 Cal. 307; *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 500; *In re Taylor*, 48 Md. 28, 30 Am. Rep. 451; *In re Maddox*, 93 Md. 727, 50 Atl. 487, 55 L.R.A. 298; *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703; *Thorn v. Lawson*, 6 Tex. 240; *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597.

<sup>2</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 500; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 19 Ann. Cas. 882, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A. (N.S.) 55.

So early as the statute 4 Henry IV, c. 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn

is not open to all, but is a special personal franchise limited to persons of good moral character, with special qualifications ascertained and certified after study and examination.<sup>3</sup> It is not "property" within the meaning of the word as used in constitutions;<sup>4</sup> nor is it a contract.<sup>5</sup> When admitted to practice, however, an attorney at law becomes an officer of the court;<sup>6</sup> and, as such, he is entitled to certain rights and privileges, and subject to certain duties and liabilities, the due observance of which is necessary for the faithful administration of the law of the land, and in order that justice may be done. Thus counsel may hold themselves out to the public for compensation as competent advisers as to what the law is, what it means, and what procedure shall be adopted to effect certain lawful ends. The ability, integrity, and wisdom displayed in such undertakings necessarily affect, and to a large extent, not only the due enforcement of the law, but the people themselves in their relations with one another. For these reasons the office of an attorney at law has been, ever since its existence, subject to the supervision of the courts. From the earliest times it has been required that counsel, by whatever name they were known, should possess certain qualifications as a prerequisite to their admission to practice.<sup>7</sup> The inalienable right

to do their duty. And many subsequent statutes have laid them under farther regulations. 3 Bl. Com. 26.

*New York.*—"A citizen of the state, of full age, applying to be admitted to practice as an attorney or counselor in the courts of record of the state, must be examined and licensed to practice as prescribed in this chapter." Sec. 460, Judiciary Law, Consol. Laws of New York.

<sup>3</sup> *Buxton v. Lietz*, 136 N. Y. S. 829; *Matter of Co-operative Law Co.*, 198 N. Y. 479, 19 Ann. Cas. 882, 92 N. E. 15, 130 Am. St. Rep. 839, 32 L.R.A. (N.S.) 55.

<sup>4</sup> *Bosque v. U. S.*, 209 U. S. 91, 28 S. Ct. 501, 52 U. S. (L. ed.) 698; *Cohen v. Wright*, 22 Cal. 307.

<sup>5</sup> *Cohen v. Wright*, 22 Cal. 307.

<sup>6</sup> See § 13.

<sup>7</sup> *Cobb v. Judge*, 43 Mich. 289, 5 N. W. 309; *McKoan v. Devries*, 3 Barb. (N. Y.) 196; *Spicer's Will*, Tuck. (N. Y.) 80; *Thorn v. Lawson*, 6 Tex. 240; *Harkins v. Murphy*, 51 Tex. Civ. App. 568, 112 S. W. 136.

In any consideration of the question it must not be forgotten that restrictions upon the privilege of practicing law are created only in the interest of the public welfare, and neither for nor against the student. No one who has commenced preparation has any inchoate right on account of that fact, but is bound to furnish the test of fitness required when he asks to enter upon the practice. In *re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

of every American citizen to follow any of the common industrial occupations of life does not extend to the pursuit of professions or avocations of such a nature as to require peculiar skill or supervision for the public welfare.<sup>8</sup>

**§ 22. Admission for Particular Business or Case.** — In the absence of statutory authority to the contrary, it is the general practice of courts of record in the several states to permit gentlemen of the bar in other states to appear as counsel on the trial or argument of causes,<sup>9</sup> as a matter of comity.<sup>10</sup> Thus practitioners in state courts may be permitted to try, or argue, a particular case, or attend to other specific legal business, in the federal courts.<sup>11</sup> In some jurisdictions a "special admission" is provided for by statute or rule of court.<sup>12</sup> Indeed counsel from sister states are sometimes allowed to assist prosecuting attorneys in the trial of criminals,<sup>13</sup> but in some jurisdictions such assistance is prohibited by statute.<sup>14</sup> The general admission of attorneys who are duly licensed to practice in sister states will be considered hereafter.<sup>15</sup>

<sup>8</sup> In re O'Brien, 79 Conn. 46, 63 Atl. 777.

<sup>9</sup> Chappell v. Real Estate Pooling Co., 89 Md. 258, 261, 42 Atl. 936; In re Mosness, 39 Wis. 509, 20 Am. Rep. 55. See also In re Day, 181 Ill. 73, 96, 54 N. E. 646, 50 L.R.A. 519.

<sup>10</sup> Matter of Mock, 146 Cal. 378, 80 Pac. 64; Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963, per Clark, J. See also In re Admission to the Bar, 61 Neb. 58, 84 N. W. 611.

<sup>11</sup> See Harland v. Lilienthal, 53 N. Y. 438; Harrington v. Edwards, 17 Wis. 586, 84 Am. Dec. 768.

<sup>12</sup> In re Robinson, 82 Neb. 172, 17 Ann. Cas. 878, 117 N. W. 352.

*The Colorado statute* provides: "Whenever any counselor at law residing in any of the adjacent states or territories may have any business in any of the courts of this state, he

may be admitted, on motion, for the purpose of transacting such business and none other." Mills's Annot. Col. Stat. (1891), § 209.

*New York.*—Rule 2 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "An attorney and counselor from another state or foreign jurisdiction may in the discretion of any court of record be admitted *pro hac vice* to participate in the trial or argument of any cause in which he may be employed."

<sup>13</sup> State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

And see § 701.

<sup>14</sup> State v. Russell, 83 Wis. 330, 53 N. W. 441.

And see § 701.

<sup>15</sup> See § 59.



### § 23. Compensation as Depending on Admission.—

The right to recover compensation for services rendered in the capacity of an attorney or counselor at law is confined to those persons who were duly admitted and entitled to practice as such in the courts<sup>16</sup> at the time the services were rendered,<sup>17</sup> and who were then in good standing.<sup>18</sup> This is especially true as to services rendered in violation of a statute prohibiting unlicensed persons from practicing law,<sup>19</sup> though an attorney may recover for legal

<sup>16</sup> *Hittson v. Browne*, 3 Colo. 304; *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546; *Tedrick v. Hiner*, 61 Ill. 189; *Ames v. Gilman*, 10 Met. (Mass.) 239; *Perkins v. McDuffee*, 63 Me. 181.

Since a corporation cannot be a member of the bar (In re Co-operative Law Co., 198 N. Y. 479, 19 Ann. Cas. 879, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A.(N.S.) 55), it cannot recover for its legal services in the collection of a claim. *Hughes v. Dougherty*, 62 Ill. App. 464.

<sup>17</sup> *Matter of Fellows*, 3 Ill. 369; *Ames v. Gilman*, 10 Met. (Mass.) 239.

<sup>18</sup> *Effect of Disbarment.*—Where an attorney was employed to prosecute a claim before the Treasury Department of the United States for one-half the sum he might recover, and, after filing the papers, etc., was disbarred from further practice in the department, it was held that the attorney having become incapable of prosecuting the claim, the consideration of the client's promise of remuneration failed, and the client having, as he had a right to do, thereupon revoked his authority, the attorney had no right upon the revocation of the order of disbarment to resume his services in the case, and his only right of recovery against the client for services

was for beneficial services rendered before his disbarment, and the burden was upon him to prove such services. *Moyers v. Graham*, 15 Lea (Tenn.) 57.

See also § 503.

<sup>19</sup> In re Horton, 8 Q. B. D. (Eng.) 434; *Hittson v. Browne*, 3 Colo. 304; *Bachman v. O'Reilly*, 14 Colo. 433, 23 Pac. 789; *Robb v. Smith*, 4 Ill. 47; *Tedrick v. Hiner*, 61 Ill. 189; *East St. Louis v. Freels*, 17 Ill. App. 339; *Sellers v. Phillips*, 37 Ill. App. 74.

"In general, when the law prohibits an act, no one can have the aid of the law to recover compensation for doing it." *Ames v. Gilman*, 10 Met. (Mass.) 239.

Obviously this principle would prevent recovery by an attorney for services in violation of a statute forbidding him to practice in any court of which he is a clerk or a judge. See *Evans v. Funk*, 151 Ill. 650, 38 N. E. 230.

*The Colorado statute* provides that "if any person not licensed as aforesaid shall receive any money or species of property as a fee or compensation for services rendered by him as an attorney or counselor at law within this state all money so received by him shall be considered as money received to the use of the person paying the same, and may be

services rendered after he has been admitted to practice, even if he contracted to perform such services before being admitted.<sup>20</sup> A law partnership is likewise disabled from recovery if one of the partners is an unlicensed person.<sup>1</sup> But in the absence of statutory regulation to the contrary,<sup>2</sup> it seems that an attorney need

recovered back with costs of suit, by an action for money had and received . . . and the person receiving such money or property shall forfeit threefold the amount of value thereof." *Hittson v. Browne*, 3 Colo. 304.

In *Maine* it has been provided by statute that no person commencing practice as an attorney or counselor at law in any other state or place, or in any court in that state, without the qualifications, oaths, and payment of the duty specified in the statute, shall be entitled to demand or receive any remuneration for professional services. *Perkins v. McDuffee*, 63 Me. 181.

In *New York* under Penal Law (Consol. Laws 1909, c. 40), § 270, providing that any person not duly licensed to practice law who holds himself out as an attorney and counselor at law, or who attempts to practice law, is guilty of a misdemeanor, a contract for services or commissions made with an individual engaged in the business of a mercantile agency for collection of accounts on behalf of clients and instituting suits for that purpose when necessary is illegal and unenforceable. *Buxton v. Lietz*, 136 N. Y. S. 829.

<sup>20</sup> *Goldenberg v. Law*, (N. M.) 131 Pac. 499.

<sup>1</sup> *Hittson v. Browne*, 3 Colo. 304, wherein the court said: "In the case of *Harland v. Lilienthal*, 53 N. Y. 440, in which the court held that a

law firm, one member of which had been duly licensed, may recover in a joint action for services rendered by the firm, there was the absence of a prohibitory statute. The remarks of the court, that if there had been a prohibitory statute or a rule of court forbidding an unlicensed attorney to practice, the fact that one member of the firm had been duly admitted would relieve from its effect, were entirely extrajudicial."

However, in *Harland v. Lilienthal*, 53 N. Y. 438, above cited, the court said: "The English authorities are, that though there be a prohibition upon the recovery for professional services, unless there has been a formal admission to practice the profession, yet that two partners, one only of whom had complied with the statute, might recover in a joint action for such services rendered by them. *Arden v. Tucker*, 4 B. & Ad. 815, 24 E. C. L. 171; *Turner v. Reynall*, 14 C. B. N. S. 328, 108 E. C. L. 328."

<sup>2</sup> Under the old statute of *Massachusetts* a person could not lawfully practice as an attorney in any court of justice within the state who was not admitted as an attorney conformably to that statute, although he was regularly admitted an attorney in the courts of another state, and afterwards removed into *Massachusetts* and permanently resided there. Such person therefore could not recover compensation for services rendered as an attorney in the courts of *Massa-*

not be admitted to practice in the particular court in which the services were rendered.<sup>3</sup> So, also, an unlicensed person may recover for such services as may lawfully be rendered by one who is not, as well as by one who is, an attorney at law.<sup>4</sup>

**§ 24. Party Prosecuting or Defending for Himself.**—Constitutional or statutory provisions invariably authorize a person to appear and conduct his own cause, as plaintiff or defendant;<sup>5</sup> and unless otherwise provided by statute, as, for instance, it is in New York,<sup>6</sup> it is immaterial that the litigant has engaged counsel to appear for him,<sup>7</sup> or that he has been disbarred from

Massachusetts prior to 1836, when the Revised Statutes took effect, altering the rules as to the right of attorneys. *Ames v. Gilman*, 10 Met. 239.

<sup>3</sup> In *Harland v. Lilienthal*, 53 N. Y. 438, it appears that the plaintiffs, attorneys duly admitted to practice in several courts, were retained by the defendant to defend an action in the United States District Court. One of the plaintiffs was properly admitted to practice therein; the other plaintiff, though entitled to be so admitted, and practicing therein without objection, had never been formally admitted. In an action by the plaintiffs for fees for services rendered in the suit in the United States District Court, it was held that the defendant could not set up the fact that one of the plaintiffs was not formally admitted, and that having bargained for and received the plaintiff's services, he should pay therefor, in the absence of a statute or rule of court preventing a recovery.

<sup>4</sup> *Bird v. Breedlove*, 24 Ga. 623; *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441.

See § 60 as to what constitutes unlawful practice of law.

<sup>5</sup> *Hightower v. Hawthorn*, Hempst. 42, 12 Fed. Cas. No. 6478b; *May v. Williams*, 17 Ala. 23; *Funded Debt Com'rs v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Gregson v. Allen*, 85 Ill. 478; *Aukam v. Zantzinger*, 94 Md. 421, 51 Atl. 93; *In re Flannery*, 150 App. Div. 369, 135 N. Y. S. 612; *Rader v. Snyder*, 3 W. Va. 413.

Section 35 of the Judiciary Act (1 Stat. L. 92) provides: "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264.

<sup>6</sup> In New York, under sec. 55, Code Civ. Pro., "if a party has an attorney in the action, he cannot appear to act in person, where an attorney may appear or act either by special provision of law, or by the course and practice of the court." See also *Halsey v. Carter*, 6 Robt. (N. Y.) 535.

<sup>7</sup> *Bolan v. Egan*, 2 Brev. (S. C.) 426.

practicing as an attorney at law.<sup>8</sup> But provisions of the character under discussion are not to be extended beyond their purpose; thus it has been held that they do not authorize, as against a prohibitory statute, a director of a bank to appear as its attorney.<sup>9</sup> In Canada an unlicensed person, although he have a substantial interest in the subject-matter of a litigation, cannot "practice" as a solicitor.<sup>10</sup>

**§ 25. Representation by Agent.** — One who has not been admitted as an attorney cannot practice as such by attempting to act as his client's agent.<sup>11</sup> Thus it has been held that a constitutional provision that a suitor shall have the right to prosecute or defend his suit "by an attorney or agent of his choice," does not authorize him to do so by a person not licensed to practice, or by a disbarred attorney.<sup>12</sup> And where a state constitution provided that any male citizen, twenty-one years old, etc., "shall be entitled to admission to practice" law, a statute, subsequently enacted, which provided that "any person of good moral character, although not admitted as an attorney, may manage, prosecute, or defend a

<sup>8</sup> *Philbrook v. Superior Ct.*, 111 Cal. 31, 43 Pac. 402.

<sup>9</sup> *West Feliciana R. Co. v. Johnson*, 5 How. (Miss.) 273.

<sup>10</sup> *In re Clark*, 32 Ont. 237.

<sup>11</sup> *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264; *Cobb v. Judge*, 43 Mich. 289, 5 N. W. 309; *Weir v. Slocum*, 3 How. Pr. (N. Y.) 397, 1 Code Rep. 105; *Harkins v. Murphy*, 51 Tex. Civ. App. 568, 112 S. W. 136.

<sup>12</sup> *Cobb v. Judge*, 43 Mich. 289, 5 N. W. 309, wherein Marston, C. J., said: "If the word 'agent' as used in the constitution is not to be construed as synonymous with the word 'attorney,' what is to be the result? Parties may appear by agents possessing no legal qualification or even ordinary intelligence, and of the worst possible character; they may

be minors, and may even be persons who have been disbarred and removed by this court from practicing as attorneys and solicitors. They could not practice as attorneys, possessing neither the legal nor moral qualifications for such a position, and yet they could appear as agents. They would possess the rights of attorneys but not be subject to the responsibilities; their removal by the court, if they could be removed, would be a mere idle ceremony. Litigants might again employ them and authorize them to appear and represent their interests, so that persons who could not practice as attorneys could as agents, with equal rights and powers. Such could not have been the intention of the framers of our fundamental law, or of the people in adopting it."

suit for any other person, provided he is specially authorized for that purpose by the person for whom he appears, in writing, or by personal nomination in open court," was declared to be unconstitutional, since it purported to authorize a person to practice even though he did not possess all the qualifications specified in the constitution.<sup>13</sup> So, also, where a statute required a pleading to be filed by the plaintiff or his attorney, it was held that an attorney at law, and not an attorney in fact, was intended.<sup>14</sup> Though the statute unequivocally gives the right to appear by agent the court in recognizing such right will give no countenance to unqualified persons who seek to engage generally in the practice of the law.<sup>15</sup>

<sup>13</sup> *McKoan v. Devries*, 3 Barb. (N. Y.) 196; *Bullard v. Van Tassel*, 3 How. Pr. (N. Y.) 402.

<sup>14</sup> *Kelly v. Herb*, 147 Pa. St. 563, 23 Atl. 889.

<sup>15</sup> "The statute of February 17, 1791, enacts 'that the plaintiff or defendant in any cause, prosecution or suit, being a citizen of this state, may appear, plead, pursue or defend, in his proper person, or by such other citizen of this state, being of good and reputable character and behavior, as he may engage and employ, whether the person so employed be admitted as an attorney at law or not.' This statute gives in express terms to every citizen of this state the right to have his cause managed by any person of good moral character whom he may see fit to employ; and we think this right includes, as a necessary incident without which it cannot be safely enjoyed, the right to instruct those who may be thus employed and to have the trust and confidence thus reposed preserved inviolate in all cases. But while we are disposed to give to every citizen the full enjoyment of all

his rights in this respect, we are not willing to give any countenance to those who, without the necessary qualifications, undertake to advise as counsel and to commence suits in their neighborhood. It has been supposed that the members of the bar were opposed to the interference of such persons in such matters, because it might tend to injure the business of the profession. But nothing can be further from the truth than such a supposition. When those who are not qualified to act as counsel engage in the practice of the law, their blunders are much more likely to increase, than their interference to diminish, the business and emoluments of the profession. No, it is from much better, much higher, much more honorable motives, that the bar withhold all countenance from ignorant obtruders. It is to preserve to the administration of justice some degree of order and regularity, and some degree of purity, that they do this; and this case is a strong illustration of the soundness and utility of the principle upon which they act." *Bean v. Quimby*, 5 N. H. 94.

**§ 26. Statutory Provisions Forbidding Unlicensed Practice.**—In nearly every jurisdiction statutes which forbid unlicensed persons to “practice” law have been enacted; and it is usually provided that a violation of such statutes may be punished either as a misdemeanor, or a contempt of court, or both. Many of the statutes also specify various acts which shall constitute unlawful practice or representation of authority to practice. These enactments, of course, furnish an additional, and to some a potent, reason why admission to the bar must be had before one may practice as an attorney. This subject will be considered more fully later.<sup>16</sup>

**§ 27. Practice in Courts Not of Record.**—Statutes prohibiting the practice of law by unlicensed persons are quite often limited in terms to practice in courts of record, and occasionally practice in justices’ courts or in a county court is expressly excepted from the prohibition. A widespread custom, which no doubt prevailed in the colonial period, sanctions practice before justices of the peace, or in other courts of that grade, by persons who are not members of the bar.<sup>17</sup> In Illinois a litigant before a justice of the peace can employ any person he may choose to conduct his cause in that tribunal, but the person thus employed, unless he is a regularly licensed attorney, is only an agent.<sup>18</sup> In some states it has been held to be within the discretion of a justice to admit an unlicensed attorney to practice before him.<sup>19</sup> This matter is, of course, subject to statutory regulation; thus in New York only licensed attorneys can practice in cities of first and second class.<sup>20</sup>

<sup>16</sup> See § 69.

<sup>17</sup> *Hall v. Sawyer*, 47 Barb. (N. Y.) 116; *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 11; *Hughes v. Mulvey*, 1 Sandf. (N. Y.) 92; *Porter v. Bronson*, 29 How. Pr. (N. Y.) 292, 19 Abb. Pr. 236 (Marine Court).

<sup>18</sup> *McLaughlin v. Gilmore*, 1 Ill. App. 563.

<sup>19</sup> *McWhorter v. Bloom*, 3 N. J. L. 545; *Pierson v. Foster*, 3 N. J. L. 546.

<sup>20</sup> New York Code Civ. Pro. § 63 provides: “A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court or before any magistrate in any city of the first or second class, or make it a business to practice as an attorney in a court or before a magistrate in any city of the first or second class, unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record

While in Tennessee practice before justices is specially provided for.<sup>1</sup>

*Jurisdiction and Regulation.*

**§ 28. Whether Judicial or Legislative Function.**—It is undoubtedly true that the power to admit one to practice as an attorney at law is a judicial function. It is a power inherent in the court,<sup>2</sup> which is to be exercised by a sound judicial discretion.<sup>3</sup> Nor is this power restricted by the Fourteenth Amendment of the Federal Constitution.<sup>4</sup> Early in the national jurisprudence it was held that the power to ad-

of the state, but nothing in this act shall be held to apply to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under article six of the Membership Corporations Law."

<sup>1</sup> *In Tennessee* it is provided that "any one over the age of twenty-one years, and of good standing, shall be entitled to practice law as an attorney, or act as counsel for any person or persons in all causes arising or coming before any justice of the peace in this state, and before the County Court of his county." Code of Tennessee Annot. (Shannon 1896) § 5773.

<sup>2</sup> *United States*.—Ex p. Secombe, 19 How. 9, 15 U. S. (L. ed.) 565; In re Garland, 4 Wall. 333, syllabus 6, 18 U. S. (L. ed.) 366; In re Thatcher, 190 Fed. 969.

*Illinois*.—In re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

*Indiana*.—Garrigus v. State, 93 Ind. 242.

*Massachusetts*.—See Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339.

*Pennsylvania*.—Breckenridge's Case,

1 S. & R. 187; In re Splane, 123 Pa. St. 527, 16 Atl. 481, 23 W. N. C. 154.

*West Virginia*.—Walker v. State, 4 W. Va. 749, 753; State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407; State v. Shumate, 48 W. Va. 359, 37 S. E. 618; State v. Stiles, 48 W. Va. 425, 37 S. E. 620; State v. Hays, 64 W. Va. 45, 61 S. E. 355; In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597.

*Wisconsin*.—In re Goodell, 30 Wis. 232, 20 Am. Rep. 42; In re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

The history of the exercise of such power in England, while interesting, is of little benefit in determining whether the power is one properly belonging to courts or to the legislature. The difference in the principles underlying the systems of government is such as to render a conclusion inapplicable, even if it should be found that Parliament had exercised such power. In re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

<sup>3</sup> In re Egan, 24 S. D. 301, 123 N. W. 478.

<sup>4</sup> In re O'Brien, 79 Conn. 46, 63 Atl. 777.

mit and remove was the exclusive province of a federal court.<sup>5</sup> And this ruling has been consistently maintained.<sup>6</sup> Where a state constitution lodges the judicial power exclusively in the courts, as a co-ordinate department of government, the legislature will not be permitted to encroach upon the judicial powers by assuming to make admission to the bar a legislative function;<sup>7</sup> in the absence of constitutional restriction, however, the power to admit attorneys at law is subject to legislative regulation.<sup>8</sup> In New Jersey attorneys at law are not appointed, licensed, or admitted to practice

<sup>5</sup> *Ex p. Burr*, 2 Cranch (C. C.) 379, 4 Fed. Cas. No. 2,186; mandamus refused by Supreme Court, 9 Wheat. 529, 6 U. S. (L. ed.) 152.

<sup>6</sup> *Ex p. Secombe*, 19 How. 13, 15 U. S. (L. ed.) 565, in which case the chief justice said: "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

This case has been repeatedly followed by federal courts, the supreme court cases being *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366; *Ex p. Bradley*, 7 Wall. 373, 377, 19 U. S. (L. ed.) 214; *Randall v. Brigham*, 7 Wall. 523, 535, 19 U. S. (L. ed.) 285; *Bradley v. Fisher*, 13 Wall. 335, 20 U. S. (L. ed.) 646; *Ex p. Wall*,

107 U. S. 265, 281, 285, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

<sup>7</sup> *In re Branch*, 70 N. J. L. 537, 57 Atl. 431; *In re Splane*, 123 Pa. St. 527, 16 Atl. 481, 23 W. N. C. 154.

<sup>8</sup> *In re Cooper*, 22 N. Y. 67, 20 How. Pr. 1, 11 Abb. Pr. 301, *reversing* 19 How. Pr. 97, 10 Abb. Pr. 348, 31 Barb. 353; *In re Applicants for License to Practice Law*, 143 N. C. 1, 10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A. (N.S.) 288.

"The manner of regulating the admission of persons to practice law is the subject of legislative action and control. At common law the courts had no power to admit attorneys or counselors. Their duties are of such character that, in order to secure proper qualification for their discharge, the legislature imposes the duty of examination and determination upon the courts. The only difference between this pursuit and that of any other for which a license is not required is that a qualification looking to competency is required in one, and the right, independent of qualification, is in the other. Because the law prescribes certain methods by which the existence of the qualification to follow a pursuit is determined, and, after determining their existence, a general authority to follow



by any branch of the judicial department of the state. They are invested with that privilege by letters-patent, issued under the great seal of the state by its chief executive, upon the recommendation of the court based upon an examination of the applicant.<sup>9</sup>

**§ 29. Statutory Regulation.**—The judicial function which is exercised in the act of admitting an attorney at law to practice is not to be, as it sometimes is, confused with the right to make reasonable regulations concerning such admissions. In the absence of constitutional authority to the contrary, the legislature undoubtedly has the right to regulate the practice of law, as well as other professions and occupations the regulation of which is for the public welfare.<sup>10</sup> The legislature may regulate admission to the bar by prescribing a standard therefor; and where the conditions of eligibility are reasonable, the court must give full effect to the statute, and want of a statutory condition necessitates the refusal to license one to practice.<sup>11</sup> Thus the legislature may prescribe the qualifications which shall be necessary in order that an attorney may be entitled to admission,<sup>12</sup> may provide for the examina-

such pursuit is granted, gives no greater right to follow that pursuit than exists in any citizen to follow any other legitimate calling or avocation." Accordingly the state has the same right to tax the business of an attorney by way of license fees that it has to tax any other business. *Young v. Thomas*, 17 Fla. 169, 173, 35 Am. Rep. 93.

*Within Police Power.*—In *In re Applicants for License*, 143 N. C. 5, 10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A.(N.S.) 288, the court said: "It is well established and sustained by the weight of authority that the legislature has the right to establish the qualifications to be required of one to become a practicing member of the bar. . . . The right to establish such qualifications rests in the police power—a power by *virtu* Attys. at L. Vol. I.—3.

tue of which a state is authorized to enact laws to preserve the public safety, maintain the public peace and order, and preserve and promote the public health and public morals."

<sup>9</sup> *In re Branch*, 70 N. J. L. 537, 57 Atl. 431.

<sup>10</sup> *Ex parte Secombe*, 19 How. 9, 15 U. S. (L. ed.) 565; *Cohen v. Wright*, 22 Cal. 293; *Ex p. Yale*, 24 Cal. 241, 85 Am. Dec. 62; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; *In re Goodell*, 39 Wis. 232, 20 Am. Rep. 42.

<sup>11</sup> *Vernon County Bar Assoc. v. McKibbin*, 153 Wis. 350, 141 N. W. 283. And see *In re Thatcher*, 190 Fed. 969.

<sup>12</sup> *Bradwell v. Illinois*, 16 Wall. 130, 21 U. S. (L. ed.) 442; *In re Lockwood*, 154 U. S. 116, 14 S. Ct.

tion of applicants,<sup>13</sup> may designate the courts which shall have power to admit such applicants, and the like.<sup>14</sup> So, also, it has been held that a statute providing that admission to practice in the Supreme Court of a state shall operate as an admission as an attorney at law in every other court of that state, without any other or further action by such other courts or by the attorney, is merely a declaration of the effect to be given to a purely judicial act of the Supreme Court in directing the admission of an attorney at law to practice before it, and is not unconstitutional.<sup>15</sup> All such laws must, of course, as well as other enactments, refrain from offending against the constitution;<sup>16</sup> and, as shown in the preceding section, the extent to which statutory regulation may go will be rather restricted where, under the constitution, the judicial department of the government has such exclusive authority, as a co-ordinate gov-

1082, 38 U. S. (L. ed.) 929; In re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519; In re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701; In re Taylor, 48 Md. 28, 30 Am. Rep. 451; In re Cooper, 22 N. Y. 67, 20 How. Pr. 1, 11 Abb. Pr. 301, *reversing* 19 How. Pr. 97, 10 Abb. Pr. 348, 31 Barb. 353; In re Yamashita, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L.R.A. 671; State v. Rossman, 53 Wash. 3, 17 Ann. Cas. 625, 101 Pac. 357, 21 L.R.A. (N.S.) 821; Vernon County Bar Assoc. v. McKibbin, 153 Wis. 350, 141 N. W. 283.

In Matter of Graduates, 11 Abb. Pr. (N. Y.) 332, the court said: "In this state it seems that attorneys, prior to the Revolution, were appointed by the governor of the colony. *People v. Justices*, 1 Johns. Cas. 132. By the constitution of 1777 the power of appointing this class of officers was vested directly in the courts; but the constitution of 1882 was silent upon the subject, thus leaving the matter in the direction and control of the legislature, which, at its next

session, passed an act requiring attorneys to be licensed by the courts in which they should respectively practice. It is plain, therefore, that although the appointment of attorneys has usually been intrusted in this state to the courts, it has been, nevertheless, both here and in England, uniformly treated not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action."

<sup>13</sup> In re Admission to Bar, 61 Neb. 58, 84 N. W. 611.

<sup>14</sup> In re Hovey, (Cal.) 80 Pac. 234; In re Admission to Bar, 61 Neb. 58, 84 N. W. 611; Nolan v. St. Louis, etc., R. Co., 19 Okla. 51, 91 Pac. 1128. See also In re Brewer, 3 How. Pr. (N. Y.) 169.

<sup>15</sup> Hoopes v. Bradshaw, 231 Pa. St. 485, 80 Atl. 1098.

<sup>16</sup> State v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174; McKoan v. Devries, 3 Barb. (N. Y.) 196. See also In re Moaness, 39 Wis. 509, 20 Am. Rep. 55.

ernmental department, that interference therewith on the part of the legislature is prohibited. So, also, laws of this character must be general in their operation.<sup>17</sup> No doubt the legislature, in framing an enactment, may classify persons so long as the law establishing classes is general, and has some reasonable relation to the end sought;<sup>18</sup> but there must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one, having no just relation to the subject of the legislation.<sup>19</sup> The legislature cannot limit the courts in their right to determine the moral qualifications of attorneys or prevent them from refusing to admit morally unfit persons to the practice of law.<sup>20</sup>

### *Eligibility Generally.*

§ 30. **Age.**—Almost invariably the statutes require that an applicant for admission to the bar shall have attained the age of twenty-one years.<sup>1</sup> Nor will the applications of minors, made with a view to their admission to the bar upon attaining their majority, be acted upon.<sup>2</sup> And even in the absence of any legislation on the subject, it is highly probable that courts would decline to license minors.<sup>3</sup> In Arkansas and Florida the statutes regulating admis-

<sup>17</sup> *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

<sup>18</sup> *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519. See also *In re Taylor*, 48 Md. 28, 30 Am. Rep. 451.

And see § 33.

<sup>19</sup> *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

<sup>20</sup> *In re Platz*, (Utah) 132 Pac. 390.

<sup>1</sup> *Ex p. Coleman*, 54 Ark. 235, 15 S. W. 470; *In re Admission to Bar*, 61 Neb. 58, 84 N. W. 611.

<sup>2</sup> *In re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611, the court said: "Application has been made by minors for present examination with a view to admission when they shall have attained the age of majority. Such is not the spirit and intent of

the statute. The age of majority, with the attendant right of controlling one's own actions free of the claim of the parent or guardian, are necessary to admission to the bar of this court; and it is contemplated that the report shall follow on the examination, and show that at that time the applicant had all the qualifications prescribed by the act of the legislature. Any other course would require a subsequent report, showing that at the time thereof the applicant had not only the requisite age, but also continued to sustain the moral character required by the statute."

<sup>3</sup> See *In re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611.

sion to the bar require that an applicant shall be twenty-one years old. Another general statute, in both states, provides for the removal of all the legal disabilities of a minor, male or female, to transact business, manage property, etc., on petition to a circuit judge. In Florida it has been held that a youth who has thus been relieved cannot be excluded from admission to the bar on the ground of his minority.<sup>4</sup> But in Arkansas the court correctly held exactly the opposite. The statutes prescribing the qualifications of those who should be allowed to follow a particular vocation are to be regarded as special statutes, said the court, while the statute for the removal of disabilities is to be regarded as a general statute, and the specific provisions of the special should be treated as exceptions to and qualifications of the general.<sup>5</sup>

**§ 31. Citizenship.**—It is usually provided, either by the constitution, the statute laws, or the rules of court in each jurisdiction, that, in order to be eligible to admission to the bar, the applicant therefor must be a citizen of the state and of the United States.<sup>6</sup>

<sup>4</sup> *State v. Baker*, 25 Fla. 598, 6 So. 445.

<sup>5</sup> *Ex p. Coleman*, 54 Ark. 235, 15 S. W. 470. See also *Doles v. Hilton*, 48 Ark. 305, 3 S. W. 193.

And as to this familiar rule of statutory interpretation see 1 Fed. Stat. Annot. cxiv., wherein it is said: "It is a well-established rule that general and specific provisions in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general," citing several illustrative federal cases.

<sup>6</sup> In *re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611; In *re Robinson*, 82 Neb. 172, 17 Ann. Cas. 878, 117 N. W. 352; In *re O'Neill*, 90 N. Y. 584, *affirming* 27 Hun 599; *Ex p. Thompson*, 10 N. C. 355; In *re Yam-*

*ashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L.R.A. 671.

The meaning of the word "citizen," in a former New York constitution providing that "any male citizen," etc., should be entitled to admission to practice law, was held to be limited to citizens of New York state. In *re Henry*, 40 N. Y. 560.

In *Ex p. Thompson*, 10 N. C. 355, Chief Justice Taylor said regarding the policy of excluding aliens from the privilege of practicing law, "Whatever discretion resides in the judges, relative to the admission of attorneys, ought to be exercised with a view to the advantage and security of the suitors in the several courts; for to them the license is a guarantee that in the opinion of the magistrates signing it the licentiate is politically, not less than legally and morally, qualified to

The privilege, however, has been extended by statute in some states to those who have declared their intention to become citizens,<sup>7</sup> and such a provision has been held to be constitutional;<sup>8</sup> but the mere declaration of an intention cannot, of course, entitle one to admission to the bar where it is self-evident that he cannot be naturalized, as, for instance, in the case of a Mongolian.<sup>9</sup> If a court has licensed an alien to practice law, it may, on discovering that it had no power to do so, and after notice and hearing, revoke the license.<sup>10</sup> By construction of the Code of Civil Procedure for

transact their business. . . . There is no profession relative to which the public good more imperiously requires that its members should duly appreciate, and honestly maintain, the freedom, the purity, and the genuine spirit of our political institutions. These are so blended and interwoven with the civil rights of the citizen, they present themselves in such an infinity of relations, as additional abutments to the several charters of property and personal security, that it is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured; how, on many important occasions, the most brilliant forensic talents can be successfully exerted, unless they are sustained and inspired by an ardent patriotism. The excellence of every human system of laws consists as much in their administration and practice as in the theory itself. Viewing the profession of the law as the source from which the superior judicial magistrates must be derived, and from which a large proportion of enlightened and efficient public officers is usually selected, every one must naturally feel solicitous that it

should not fall into such hands as would lower it in the national opinion. It would be difficult to avoid this consequence if aliens were entitled to admission; for legal acquirements and private worth may subsist with inveterate prejudices against the principles of our government. In such an arrangement society would cease to derive that benefit from the profession which it now affords, by supplying a continual succession of men qualified and worthy to preside in the courts of justice. No longer a nursery in which merit is trained under the directing hand of experience, and qualified to render manly and essential services to the community, the legal profession 'in its nature the noblest and most beneficial to mankind; in its abuse and debasement the most sordid and pernicious,' would sink into a mere mercenary instrument, without sympathy in the public prosperity, and without hold on the public confidence."

<sup>7</sup> *In re Hong Yen Chang*, 84 Cal. 163, 24 Pac. 150.

<sup>8</sup> *Ex p. Porter*, 3 Ohio Dec. 333.

<sup>9</sup> *In re Hong Yen Chang*, 84 Cal. 163, 24 Pac. 156.

<sup>10</sup> *In re O'Neill*, 90 N. Y. 584, *affirming* 27 Hun 599.

the Philippine Islands,<sup>11</sup> all foreigners are excluded from the legal profession in these islands: all members of the bar must be either citizens of the United States, or persons enjoying the status of natives of the Philippines.<sup>12</sup> A similar rule prevails in Hawaii.<sup>13</sup> In the absence of any constitutional prohibition, however, the legislature would have power to provide for the admission of aliens to the bar.<sup>14</sup> And where neither the constitution, nor any other law or rule, prohibits an alien's admission, the court has, in the exercise of its discretion, allowed it,<sup>15</sup> but the validity of such action is, to say the least, doubtful.<sup>16</sup> It seems that even an alien may be permitted, as a matter of comity, to appear in or conduct a particular case.<sup>17</sup>

**§ 32. Residence.** — Under most of the state statutes a person's residence in the state for a specified period immediately preceding his application for admission to the bar is an essential qualification for admission.<sup>18</sup> The reason for such provisions is, as stated

<sup>11</sup> 1 Pub. Laws, p. 378, § 13, quoted in *Bosque v. U. S.*, 209 U. S. 91, 99, 28 S. Ct. 501, 52 U. S. (L. ed.) 698.

<sup>12</sup> *Bosque v. U. S.*, 209 U. S. 91, 28 S. Ct. 501, 52 U. S. (L. ed.) 698.

<sup>13</sup> In *Ashford's Petition*, 4 Hawaii 614, the court held that by construction of the Hawaiian Civil Code it had no power to admit to the bar a person who was not a subject of Hawaii.

<sup>14</sup> See *In re O'Neill*, 90 N. Y. 584; *Ex p. Thompson*, 10 N. C. 355, 359.

See also §§ 28, 29.

<sup>15</sup> *Matter of Emmet*, cited in *Codwise v. Hacker*, 2 Cai. (N. Y.) 386, wherein it was said: "In the case of *Thomas Addis Emmet, Esq.*, who was admitted in this term to the degree of counselor, the court determined that alienism was no bar to admission, our statute not requiring the oaths of abjuration and allegiance to be administered either to counsel or at-

torneys, and this court having, therefore, no power so to do. That the only oath requisite was that of office; nor could they conceive how the practice of admitting the others had crept in, unless from the old colonial practice, under the statute of 13 Wm. III. (c. 6), made to secure the crown against the Pretender, by the provisions of which counselors and attorneys are enjoined to take the oaths of allegiance and abjuration. But by those of 4 Hen. IV. (c. 18), from whence our act is borrowed, the oath of office only is prescribed, upon taking of which Mr. Emmet received his license."

<sup>16</sup> See *Caines' Case*, 3 Johns. Cas. (2d ed. N. Y.) 499, holding that an alien cannot be admitted, since he cannot take the oath of allegiance. And see § 54.

<sup>17</sup> See § 22.

<sup>18</sup> *In re Admission to Bar*, 61 Neb.

in one case, that "practicing attorneys who reside in other states or any of the territories are, as a rule, out of the jurisdiction of the courts of this state, and beyond the reach of its process in case their professional action is called in question and the disciplinary power of the court is invoked against them."<sup>19</sup> Accordingly, pursuant to statutory mandate, a reputable member of the Iowa bar, whose home and office were at Sioux City, just over the line between the two states, and whose professional business in Nebraska had grown to large dimensions, was denied admission to practice generally in the courts of Nebraska.<sup>20</sup> Likewise, an Illinois attorney, resident in that state, was denied a general license to practice

58, 84 N. W. 611; *In re Robinson*, 82 Neb. 172, 17 Ann. Cas. 878, 117 N. W. 352.

In *North Carolina* under the code provision which requires all attorneys to take an oath of allegiance to the state it would seem that a residence in that state is a necessary qualification for admission to the bar. See *Manning v. Roanoke, etc.*, R. Co., 122 N. C. 824, 28 S. E. 963.

<sup>19</sup> *In re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611, quoted in the case of *In re Robinson*, 82 Neb. 172, 17 Ann. Cas. 878, 117 N. W. 352.

In the case of *In re Mosness*, 39 Wis. 509, 511, 20 Am. Rep. 55, Chief Justice Ryan said: "The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We

take it that members of the bar of this state lose their right to practice here by removing from the state. After they become nonresidents they can appear in courts of this state *ex gratia* only. Our courts cannot have a nonresident bar."

If a nonresident attorney had no office within the state he might entirely evade service of papers upon him pursuant to statutory regulations, and thus "baffle his adversary and the court;" and he might also evade the remedies by attachment or punishment for contempt of court for the commission of various acts of misconduct. *Richardson v. Brooklyn City, etc.*, R. Co., 22 How. Pr. (N. Y.) 368.

<sup>20</sup> *In re Robinson*, 82 Neb. 172, 17 Ann. Cas. 878, 117 N. W. 352, quoting the statute, however, which provides that "any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts, may, on motion, be admitted to practice (for the purpose of said business only) in either of said courts, upon taking the oath as aforesaid." See also *In re Burton*, 76 Neb. 752, 107 N. W. 1015.

in Wisconsin.<sup>1</sup> But it is the usual practice of courts of record in the several states to permit members of the bar in other states to appear as counsel on the trial or argument of causes, without obtaining a general license, the custom being to grant leave *ex gratia* for the occasion.<sup>2</sup> In New York it is provided by statute that a person regularly admitted to practice as an attorney and counselor in the courts of record of the state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor, although he resides in an adjoining state.<sup>3</sup> The admission of aliens has been considered hereinbefore.<sup>4</sup>

§ 33. Race. — Where an applicant for admission to the bar is of a race the members of which are not entitled to citizenship in the United States, he cannot be admitted to practice, as, by way of illustration, where the applicant is a Mongolian.<sup>5</sup> Where, however, the applicant's race does not prevent his becoming a citizen, as in the case of the negro, a different question arises. It has been held that the Fourteenth Amendment of the Federal Constitution has reference only to the rights and immunities belonging to citizens of the United States as such, as contradistinguished from those belonging to them as citizens of a state.<sup>6</sup> It seems clear also that the right to control and regulate the granting of a license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, and that its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.<sup>7</sup> Therefore, it has been held that the privilege of admission to the

<sup>1</sup> In *re Mosness*, 39 Wis. 509, 20 Am. Rep. 55, holding that if the Wisconsin statute intended to deprive the court of the power to withhold a license in such a case, "it was clearly beyond the power of the legislature."

<sup>2</sup> See § 22.

<sup>3</sup> § 470 of the Judiciary Law.

<sup>4</sup> See § 31.

<sup>5</sup> In *re Hong Yen Chang*, 84 Cal.

163, 24 Pac. 156 (Chinese); In *re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L.R.A. 671 (Japanese).

<sup>6</sup> The Slaughter-House Cases, 16 Wall. 36, 21 U. S. (L. ed.) 394; *Matter of Taylor*, 48 Md. 28, 30 Am. Rep. 451.

<sup>7</sup> *Bradwell v. Illinois*, 16 Wall. 130, 21 U. S. (L. ed.) 442; In *re Taylor*, 48 Md. 28, 30 Am. Rep. 451.



office of an attorney cannot be said to be a right or immunity belonging to the citizen, but is governed and regulated by the state legislature, which may prescribe the qualifications required, and designate the class of persons who may be admitted, and thus exclude the negro.<sup>8</sup> As said by Mr. Justice Bradley, "in the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience, for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state."<sup>9</sup> It is a fact, however, that negroes have been admitted to practice in almost all jurisdictions. In some states it is expressly provided by statute that race shall not constitute a cause for refusing to admit an applicant to practice law.<sup>10</sup>

**§ 34. Moral Character.** — Satisfactory evidence of the good moral character of an applicant for admission to the bar is required in all jurisdictions,<sup>11</sup> to the end that the court may be assured that the applicant is a proper person to transact faithfully and honestly the business of an attorney at law.<sup>12</sup> If it appears

<sup>8</sup> *In re Taylor*, 48 Md. 28, 30 Am. Rep. 451.

<sup>9</sup> *Bradwell v. Illinois*, 16 Wall. 130, 21 U. S. (L. ed.) 442; *In re Taylor*, 48 Md. 28, 30 Am. Rep. 451.

<sup>10</sup> N. Y. Code Civ. Pro. § 56; *Judiciary Law, Consol. Laws of New York*, § 467.

<sup>11</sup> See *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366; N. Y. Code Civ. Pro. § 56.

Attorneys "are required to be of good moral character, so that the agents and officers of the court, which they are, may not bring discredit upon the due administration of the law." Per Marston, C. J., in *Cobb v. Judge*, 43 Mich. 289, 291, 5 N. W. 309.

"The public policy of our state has always been to admit no person to

the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice than legal learning. Legal learning may be acquired in after years, but if the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling—a curse instead of a benefit to his community." Per Brown, J., dissenting in *In re Applicants for License*, 143 N. C. 1, 21, 10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A. (N.S.) 288.

<sup>12</sup> *State v. Byrkett*, 4 Ohio Dec. 89.

that the applicant is deficient in this respect, his application will be denied.<sup>18</sup> It is clearly within the power of the legislature, or of the court in the absence of legislation, not only to prescribe a requirement as to good character, but to designate the person, body,

The requirement as to good moral character includes common honesty, which is not satisfied by such conduct as merely enables one to escape the penalties of the criminal law. *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.

*New York*.—Rule 10 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "The justices of the appellate division in each department may adopt for their several and respective departments such additional special rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

Rule 1 of the general rules of practice provides: "Within ten days after the first day of January in each year, the appellate division in each department shall appoint a committee on character and fitness of not less than three for the department, or may appoint a committee for each judicial district within the department, to whom shall be referred all applications for admission to practice as attorney and counselor at law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the state board of law examiners, or upon motion under rule II of the rules of the Court of Appeals for the admission of attorneys and counselors at law. The committee shall require the attend-

ance before it, or a member thereof, of each applicant, with the affidavit of at least two practicing attorneys acquainted with such applicant, residing in the judicial district in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based, and it shall be the duty of the committee to examine each applicant, and the committee must be satisfied from such examination, and other evidence that the applicant shall produce, that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justifies admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect, unless the court otherwise orders. . . . No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such character as justifies his admission to the bar and qualifies him to perform the duties of an attorney and counselor at law."

<sup>18</sup> *In re Attorney's License*, 21 N. J. L. 345; *In re Harris*, 66 N. J. L. 473, 49 Atl. 728; *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597.

or officer from whom a recommendation to this effect shall be obtained. Thus it may be rendered essential that the applicant be recommended by the county bar association before he will be entitled to examination by the state examining board;<sup>14</sup> and where an attorney of one state applies for admission to practice his professional calling in another, it is usual to require a certificate of character from the court wherein he has last practiced,<sup>15</sup> and this is also true of an application for admission to practice in a county other than that wherein the applicant was originally admitted, where that system prevails;<sup>16</sup> and, necessarily, those to whom he is thus referred may, for proper cause, refuse to recommend him.<sup>17</sup> The presentation to the court of an acceptable certificate of character is at least *prima facie* evidence that the applicant possesses this essential attribute;<sup>18</sup> but as evidence of character is at best

<sup>14</sup> *In re O'Brien*, 79 Conn. 46, 63 Atl. 777.

<sup>15</sup> See § 59.

<sup>16</sup> *Matter of Splane*, 123 Pa. St. 527, 539, 16 Atl. 481, where Paxson, C. J., said: "A lawyer may chance to be a member of the bar of half the counties in the state; he may be admitted in a county other than the one in which he resides, for the mere purpose of trying a single case. It is the merest evasion of the act to present the certificate of the judge of a district where the petitioner has not last lived and practiced, and an admission to the bar obtained by such means might well be vacated by the judge who should inadvertently grant it, as a fraud upon the court."

<sup>17</sup> *In re O'Brien*, 79 Conn. 46, 63 Atl. 777.

<sup>18</sup> *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597.

Under the West Virginia statute an applicant for a license to practice law must first prove to the satisfaction of the county court of his county

that he has a good moral character, whereupon that court enters an order on its record accordingly, and a certified copy of the order must be produced in support of the application in the Supreme Court of Appeals, or other court, for a license to practice. After much consideration it was held that the statute intended to make the order of the county court simply *prima facie* evidence. *In re Application, etc.*, 67 W. Va. 213, 67 S. E. 597, 601 (by a divided court), wherein Miller, J., speaking for a majority of the court said: "We cannot assume the legislature thus intended to impose unworthy persons upon the courts. The contrary is to be presumed. We must construe the statute as intended to be in aid of the courts, and to leave this court, upon an application for license, and all the courts upon application for admission to practice, free to treat the order of the county court simply as *prima facie* evidence, and to institute any other and further inquiry into the moral character of the appli-

but that of reputation, it is clear that even such a certificate is not binding on the court; they not only may, but where it is believed that there is a good reason for so doing, they should, look behind such certificate in order to determine to their own satisfaction the fitness of the applicant in this respect.<sup>19</sup> In North Carolina, however, under a statute which provided that "all applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in all the courts of this state," it was held that the court had no power to go behind the certificate and investigate the moral character of an applicant for admission to the bar.<sup>20</sup>

**§ 35. Eligibility of Corporations.** — A corporation cannot be admitted to the bar; and, as it cannot practice law directly, it cannot do so indirectly by employing competent lawyers to prac-

cant deemed necessary. Otherwise the act of the legislature would have to be declared an encroachment on the judiciary, and void on constitutional grounds." Poffenbarger, J. (Brannon, J., concurring), in the course of an elaborate dissenting opinion, said: "There is a distinction between the licensing of a person to practice law and his admission to the bar of the court after he has been licensed. This court alone can grant a license. That license is good all over the state, but it alone does not admit its holder to the bar of any court in the state, not even this, the granting, court. A subsequent act of admission is essential to enrollment as a member of the bar, and each court must do that for itself. The license is an essential prerequisite to admission. Without it, no application for admission can be made, but it is not admission, nor the equivalent thereof. Practicing without admission, after having obtained a license, is made a misdemeanor and punished by fine. Whether a

licensee can be denied admission is another question altogether, and has no material bearing on the interpretation of the statute. In marking this distinction between license and admission, I am merely stating the plain terms of the statute. 4 Min. Inst. pt. 1, 204. From this it is plain that the license only enables its holder to apply for admission. The requirement is a limitation upon the right to make such application. . . . This distinction between license and admission or membership of the bar has not escaped judicial notice. On the contrary, it has been asserted and emphasized." *Citing Fisher's Case*, 6 Leigh (Va.) 619; *Ex p. Hunter*, 2 W. Va. 122, 144, and *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>19</sup> *In re Attorney's License*, 21 N. J. L. 345.

<sup>20</sup> *In re Applicants for License*, 143 N. C. 1, 10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A.(N.S.) 288.

tice for it, as that would be an evasion which the law will not tolerate.<sup>1</sup>

*Eligibility of Women.*

§ 36. **Present Status.**—Either by virtue of specific statutory authority, or by judicial construction of laws which contain no prohibitory phraseology, the eligibility of women to practice law is generally recognized.<sup>2</sup> It seems that Arkansas, Georgia, and

<sup>1</sup>In *re Co-operative Law Co.*, 198 N. Y. 479, 19 Ann. Cas. 882, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A. (N.S.) 55, per Vann, J., continuing as follows: "The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbar-

ment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state. A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry."

<sup>2</sup>*Colorado.*—In *re Thomas*, 16 Colo. 441, 27 Pac. 707, 13 L.R.A. 538.

*Connecticut.*—In *re Hall*, 50 Conn. 131, 47 Am. Rep. 625.

*Indiana.*—In *re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701.

*New Hampshire.*—In *re Ricker*, 66 N. H. 207, 29 Atl. 559, 24 L.R.A. 740.

*New York.*—Code Civ. Pro. § 56, *rendering obsolete* In *re Stoneman*, 53 Am. Rep. 325 note (decided prior to the amendment of § 56 of the code above cited).

*Pennsylvania.*—In *re Kilgore*, 17 W. N. C. 562, 14 W. N. C. 466, 2 Del. Co. Rep. 105; In *re Richardson*, 3

Virginia are the only states wherein women are now refused admission to practice.<sup>3</sup> A custom against the admission of women could not, it has been held, be predicated on the fact that they had never before been allowed to practice.<sup>4</sup> The necessity of increasing the avenues of employment to which women may direct their talents has swept away barriers which in the past would surely have prevented their admission to the bar. Thus it has been held that the fact that an applicant is a married woman does not constitute a disability in this respect.<sup>5</sup> So, too, it has been held that the requirement as to the taking of the oath of office does not prevent the admission of women to the bar.<sup>6</sup> Even a constitutional provision to the effect that every person of good moral character, *being a voter*, shall be entitled to admission to the bar, was held not to exclude women from the practice of law.<sup>7</sup> The general question of admitting women to practice has been the source of so many interesting and varied opinions that it has been considered advisable to set them out more fully in the sections which follow.

**§ 37. At Common Law.** — By the common law of England no woman, married or unmarried, under the degree of a queen, could take part in the government of the state; women could not sit in the House of Commons or in the House of Lords, nor vote for members of Parliament;<sup>8</sup> they could not take part in the administration of justice, either as judges or jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of

Pa. Dist. Ct. 299; *In re Kast*, 14 Pa. Co. Ct. 432, 3 Pa. Dist. Ct. 302.

*Wisconsin*.—*In re Goodell*, 48 Wis. 693, 81 N. W. 551, *rendering obsolete* *In re Goodell*, 39 Wis. 232, 20 Am. Rep. 42 (decided prior to the statute which authorizes the admission of women to the bar).

<sup>3</sup> The text statement as to the states wherein women are not admitted to practice law is made on the authority of data furnished to the author by the editor of the *Women Lawyers' Journal* (Richmond Hill, N. Y.).

<sup>4</sup> *In re Kilgore*, 14 W. N. C. (Pa.) 466.

<sup>5</sup> *In re Kilgore*, 17 W. N. C. (Pa.) 475, 5 Atl. 872. See also *Ricker's Petition*, 66 N. H. 207, 29 Atl. 559, 24 L.R.A. 740; *In re Kilgore*, 14 W. N. C. (Pa.) 255; *In re Kilgore*, 2 Del. Co. Rep. (Pa.) 105.

<sup>6</sup> *Richardson's Case*, 3 Pa. Dist. Ct. 299. *Contra* *Lockwood v. U. S.*, 9 Ct. Cl. 346.

<sup>7</sup> *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701.

<sup>8</sup> *In re Robinson*, 131 Mass. 376, 377, 41 Am. Rep. 239, citing 4 Inst.

pregnancy.<sup>9</sup> And no case is known in which a woman was admitted to practice as an attorney, solicitor, or barrister.<sup>10</sup> Indeed, it is generally conceded that women have no common-law right to practice law.<sup>11</sup> It will be noticed, however, that women have

5, *Rutland's Case*, 6 Coke (Eng.) 52b, and *Chorlton v. Lings*, L. R. 4 C. P. (Eng.) 374, 391, 392.

"The common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them." *Opinions of Justices*, 115 Mass. 602, holding that, under the state constitution, a woman was capable of being a member of a school committee.

<sup>9</sup> *In re Robinson*, 131 Mass. 376, 41 Am. Rep. 239, citing 2 Inst. 119, 121, 3 Bl. Com. 362, 4 Bl. Com. 395, and *Willes, J.*, in *Chorlton v. Lings*, L. R. 4 C. P. (Eng.) 390, 391.

<sup>10</sup> *In re Bradwell*, 55 Ill. 535, 539, *Lawrence, J.*, said: "Female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons."

In *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239, Mr. Justice Gray said: "The only English 'instance of a woman lawyer' cited by the petitioner is that stated in a note of Mr. Butler to Coke upon Littleton as follows: 'The celebrated Anne, Countess of Pembroke, Dorset and Montgomery, had the office of hereditary Sheriff of Westmoreland, and exercised it in per-

son. At the assizes . . . she sat with the judges on the bench.' Co. Litt. 326a note 280. No authority is given for the statement. . . . It is quite possible that, as a matter of ceremony, or by way of asserting her title to the office, she (as well as her ancestress three centuries before) may sometimes herself have attended the judges, or that, in accordance with English usage, a person of her rank and distinction, when present in court, may have been invited by them to sit upon the bench. But that she habitually discharged the general duties of the office in person has been shown by an accomplished scholar, after careful research, to be highly improbable in fact. 4 Craik's *Romance of the Peerage*, 162. And she could not have done so without violating the well-settled law. . . . And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold, without express authority of statute, except that of overseer of the poor, a local office of an administrative character, in no way connected with judicial proceedings."

<sup>11</sup> See *Bradwell v. Illinois*, 16 Wall. 130, 21 U. S. (L. ed.) 442, per Mr. Justice Bradley; *Lockwood v. U. S.*, 9 Ct. Cl. 346; *In re Thomas*, 16 Colo. 441, 27 Pac. 707; *In re Bradwell*, 55 Ill. 535; *In re Maddox*, 93 Md. 727, 50 Atl. 487; *Matter of Kilgore*, 14 W. N. C. (Pa.) 30; *Matter of Kilgore*,

been admitted to practice in several states, not because of the existence of any statutory authority for such action, but because there were no statutes which prohibited it.<sup>12</sup> Assuming that those cases were rightly decided, we must then conclude either that there was no actual inhibition at common law,<sup>13</sup> or, if it were otherwise, that the courts have disregarded it as unsuited to our present-day

14 W. N. C. (Pa.) 255; *In re Goodell*, 39 Wis. 232, 20 Am. Rep. 42; *In re French*, 37 N. Bruns. 359.

*In the Province of New Brunswick* the Supreme Court refused an application in 1905 to admit a spinster as an attorney of that court, the sole ground being that her right to be admitted did not exist at common law, and she was not a "person" within the meaning of the act of assembly, 1 Consolidated Statutes, 1903, chap. 68, sec. 13, respecting the Barristers' Society and barristers, attorneys, and students-at-law. *In re French*, 37 N. Bruns. 359. Tuck, C. J., said: "If this young lady is entitled to be admitted an attorney she will in a year be entitled to be called to the bar, and, in a few years, will be eligible to be appointed to the bench ["If that be the inevitable consequence, worse things might happen," remarked the woman's counsel]. As to the American cases, they are nearly equally divided and give no help one way or the other. The decisions seem to be based on ideas which prevail in the different states." Hanington, J., said: "It seems to me, upon examination of the British authorities, and also some of the authorities in the United States, to be clearly determined that females are not, unless by statutory enactment enabling it, qualified to be admitted and enrolled as attorneys of our courts. We find that a few of the United States courts

have determined otherwise, but generally it has been declared by the courts of that country that statutory authority is necessary to enable a woman to be admitted. The remedy in this case is with the legislature and not with this court. Whatever our individual opinions may be as to the advisability of extending the right to women, we are bound by the law of this country as we now find it." Barker, J., said: "In the United States, where the tendency of popular opinion is in favor of extending rather than limiting the sphere of women's work, there seems to be perhaps not a uniform, but certainly a very general consensus of judicial opinion against any such right existing, except where it has been specifically conferred by legislative enactment. . . . It is very evident, I think, that neither this court in any of the rules which it has made or sanctioned, nor the Barristers' Society in the rules which it has made, nor the legislature in enacting chapter 68, had any thought or intention of making the radical change now suggested, and that by every rule of construction applicable to such a case this court is bound to hold that no such change has been made." McLeod and Gregory, JJ., agreed with Barker, J.

<sup>12</sup> See § 36 and cases therein cited.

<sup>13</sup> *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701 (quoted in the note following).



needs, as they have done in many other instances.<sup>14</sup> It is the everyday experience of the judges to be confronted with new points of law which never have arisen before, where no statutes and no precedents exist for guides, and which can only be resolved by the application of general rules of justice and right to new combinations of facts. Not only so, but it constantly happens that the courts, refusing to be bound by some antiquated and musty precedent or obsolete rule, lay down new rules more conformable to the altered opinions and habits of society, and the new exigencies of a changing civilization.<sup>15</sup> It has been pointed out that reasoning

<sup>14</sup> 6 Am. & Eng. Enc. of Law (2d ed.) 286.

"Custom and the usages of Westminster Hall granted permission to men. Some of the early statutes of England granted the privilege to men who, upon examination by the justices, were found to be 'good and virtuous and of good fame,' and when they should be 'sworn well and truly to serve in their offices, and especially that they make no suit in a foreign country,' but the letter of such statutes did not exclude women. The custom and usages of Westminster Hall were incident to the prevailing order of society, that to the domestic sphere only did the functions of womanhood belong; that woman had, and could have, no legal existence apart from her husband; that she could not engage in business on her separate account, could make no contract without the consent of her husband; that her separate earnings belonged to her husband; that woman, from the delicacy of her nature, was unfitted for the activities of the sphere occupied by men. Such of these fictions as became a part of the law of this country are rapidly disappearing, and few, if any, of them exist in Indiana. It need not be considered whether we have adopted the customs and usages of Westminster Hall as a part of our common law. If they were the incidents of these fictions, they have vanished with the fictions. The other learned professions of this state are open alike to the sexes. There is no reason for an exception of the legal profession. If nature has endowed woman with wisdom, if our colleges have given her education, if her energy and diligence have lead her to a knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fiction must bar the door against her? Whatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens, that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions, or other vocations. This right may not, of course, be pursued in violation of laws, but must be held to exist as long as not forbidden by law." In re Leach, 134 Ind. 667, 668, 34 N. E. 641, 21 L.R.A. 701.

<sup>15</sup> "When courts cannot solve such questions by reference to books or Attys. at L. Vol. I.—4.

predicated upon historic custom or usage in England, in the American colonies, and in the republic during its infancy, possesses the inherent weakness of ignoring to a greater or less extent the marvelous changes throughout the country during the last fifty years in the legal status of women.<sup>16</sup>

**§ 38. Right to Admission under Federal Constitution and Statutes.** — The United States Supreme Court has held that under no provision of the Federal Constitution is a woman entitled to be admitted by the courts of a state to practice law in those courts, since the right is not one of the "privileges and immunities" of citizens of the United States, and also because the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence, fairly belongs to the police power of the state.<sup>17</sup> An Act of Congress passed in 1879,<sup>18</sup> however, provides for the admission to practice before the Supreme Court of the United States, of women who have been so admitted in any state, or in the District of Columbia.<sup>19</sup>

**§ 39. Legal Arguments for and against Admission.** — In favor of allowing women to practice law under old statutes the courts have reasoned (1) that every word importing the masculine gender only, may extend to and be applied to females;<sup>20</sup> (2) that existing statutes should be construed as if they were recently enact-

cases, they must decide them by that common sense of justice which is natural to man, by that 'right reason conformable to nature' of which Cicero speaks." *Matter of Kilgore*, 14 W. N. C. (Pa.) 466, 17 Phila. 281, 41 Leg. Int. 184.

<sup>16</sup> *In re Thomas*, 16 Colo. 441, 27 Pac. 707, 13 L.R.A. 538.

<sup>17</sup> *Bradwell v. Illinois*, 16 Wall. 130, 21 U. S. (L. ed.) 442, *affirming* 55 Ill. 535; *In re Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 U. S. (L. ed.) 320.

<sup>18</sup> Act of Feb. 15, 1879, ch. 81, 20 St. L. 292, 1 Fed. Stat. Ann. 518.

<sup>19</sup> *Law Notes*, vol. 14, p. 127 (Oct., 1910), wherein is noted the fact that a married woman was so admitted, and that she was the thirty-sixth who had benefited by the act.

<sup>20</sup> *In re Thomas*, 16 Colo. 441, 27 Pac. 707, 13 L.R.A. 538; *Matter of Kilgore*, 14 W. N. C. (Pa.) 466, 17 Phila. 281, 41 Leg. Int. 184.

ed, and not with reference to what was in the mind of the legislature at the time of their enactment;<sup>1</sup> (3) that all statutes are to be construed, as far as possible, in favor of equality of rights, and that all restrictions upon human liberty, and all claims for special privileges, are to be regarded as having a presumption of law against them;<sup>2</sup> (4) that the status of women has, in the eye of law, and in popular acceptation, so changed as not only to permit their admission to the bar, but practically to demand it.<sup>3</sup> In refus-

<sup>1</sup> In *re Hall*, 50 Conn. 131, 47 Am. Rep. 625, wherein it was said: "But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute we are now considering was passed it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men? We know of no distinction in respect to this rule between the case of a statute and that of a constitutional provision. When our state constitution was adopted in 1818 it was provided in it that every elector should be 'eligible to any office in the state' except where otherwise provided in the constitution. It is clear that the convention that framed, and probably all the people who voted to adopt the

constitution, had no idea that black men would ever be electors, and contemplated only white men as within any possible application of the provision, for the same constitution provided that only white men should be electors. But now that black men are made electors, will it do to say that they are not entitled to the full rights of electors in respect to holding office, because an application of the provision to them was never thought of when it was adopted?"

<sup>2</sup> In *re Hall*, 50 Conn. 131, 47 Am. Rep. 625, opinion by Chief Justice Park. Text quotation approved in *In re Leach*, 134 Ind. 665, 671, 34 N. E. 641, 21 L.R.A. 701.

<sup>3</sup> In *re Hall*, 50 Conn. 131, 47 Am. Rep. 625.

See also §§ 36, 37.

In *In re Thomas*, 16 Colo. 441, 444, 27 Pac. 707, 13 L.R.A. 538, the court said: "In this commonwealth women of sufficient age, married or single, may make contracts, form partnerships, inherit, acquire and dispose of property in all respects substantially the same as men. The policy of our legislative and judicial action has tended constantly toward conferring upon them the same property rights and business status as are enjoyed by men. They may undoubtedly pursue all vocations and

ing to admit women to practice law the reasoning employed is practically the opposite of that which favors their admission to the bar. Thus it has been held that women are generally unfitted for the legal profession;<sup>4</sup> that words importing the masculine gender in the statutes cannot be read so as to include women;<sup>5</sup> and that their admission was never contemplated by the legislature.<sup>6</sup> So, also, women were denied admission because, it was said, of the absence of statutory authority to admit them to the bar;<sup>7</sup> or because of prohibitory language in existing statutes,<sup>8</sup> or in the constitution.<sup>9</sup>

**§ 40. Nonlegal Arguments for and against Admission.** — Mr. Justice Bradley, speaking for the United States Supreme Court, declared that "nature herself has always recognized a wide difference in the respective spheres and destinies of man and woman;" that "the constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood;" that "the harmony, not to say identity, of interests and views which belong

enterprises of a business character. They may also become ministers, physicians or educators, and if any limitation in regard to the learned professions exists, such limitation applies solely to the bar. . . . Hence we contend with none of the difficulties encountered by the courts above mentioned arising from the disabilities of women, especially married women, at the common law. Applications like the one before us may therefore be regarded with the judicial favor usually extended when equality of rights is involved, unless some restrictive provision be found in our statutes or constitutions."

<sup>4</sup> *Lockwood v. U. S.*, 9 Ct. Cl. 346;  
In re *Bradwell*, 55 Ill. 535.

<sup>5</sup> *Lockwood v. U. S.*, 9 Ct. Cl. 346;

In re *Maddox*, 93 Md. 727, 50 Atl. 487, 55 L.R.A. 298.

<sup>6</sup> In re *Bradwell*, 55 Ill. 535; In re *Robinson*, 131 Mass. 376, 41 Am. Rep. 239; In re *Leonard*, 12 Ore. 93, 6 Pac. 426, 53 Am. Rep. 323. See also *Ex p. Griffin*, (Tenn.) 71 S. W. 746; In re *Goodell*, 39 Wis. 232, 20 Am. Rep. 42.

<sup>7</sup> In re *Bradwell*, 55 Ill. 535; In re *Maddox*, 93 Md. 727, 50 Atl. 487, 55 L.R.A. 298; In re *Robinson*, 131 Mass. 376, 41 Am. Rep. 239, 24 Alb. L. J. 448; In re *Leonard*, 12 Ore. 93, 6 Pac. 426, 53 Am. Rep. 323; *Ex p. Griffin*, (Tenn.) 71 S. W. 746.

<sup>8</sup> In re *Maddox*, 93 Md. 727, 50 Atl. 487, 55 L.R.A. 298 (right confined to male citizens).

<sup>9</sup> See *Lockwood v. U. S.*, 9 Ct. Cl. 346.

or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband;" and finally that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother" and "this is the law of the Creator."<sup>10</sup> That "the laws of God, or for those who deny his existence, the laws of nature," distinctly point in the direction indicated by Mr. Justice Bradley has been perceived by other judges.<sup>11</sup> Mr. Justice Bradley also intimated that "decision and firmness which are presumed to predominate in the sterner sex" are qualities recommending men to the exclusive privilege of practicing law.<sup>12</sup> But "there are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man would achieve," argued eminent counsel in the same case.<sup>13</sup> "It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman,"<sup>14</sup> on

<sup>10</sup> *Bradwell v. Illinois*, 16 Wall. 130, 141, 21 U. S. (L. ed.) 442 (Chief Justice Chase dissenting), quoted in *In re French*, 37 N. Bruns. 359, 365.

<sup>11</sup> *Matter of Kilgore*, 14 W. N. C. (Pa.) 255, per Ludlow, P. J.

"That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth. It may have been a radical error, but that this was the universal belief certainly admits of no denial." Per Mr. Justice Lawrence in *In re Bradwell*, 55 Ill. 535, 539.

"We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are

many employments in life not unfit for female character. The profession of the law is surely not one of these." Per Chief Justice Ryan in *Matter of Goodell*, 39 Wis. 232, 244, 245, 20 Am. Rep. 42.

<sup>12</sup> *Bradwell v. Illinois*, 16 Wall. 130, 142, 21 U. S. (L. ed.) 442.

<sup>13</sup> Argument of Matthew Hale Carpenter, in *Bradwell v. Illinois*, 16 Wall. 130, 137, 21 U. S. (L. ed.) 442.

"A union of the peculiar delicacy, refinement, and conscientiousness attributed to women, with the decision, firmness, and vigor of man, are not only desirable but necessary in promoting 'the proper administration of justice' in our courts." Argument of Miss Goodell in *Matter of Goodell*, 39 Wis. 232, 237, 20 Am. Rep. 42.

<sup>14</sup> "A sacrifice of all those qualities which it especially behooves us all to cherish and protect." Per Biddle, J., in *Matter of Kilgore*, 17 W. N. C. (Pa.) 562.

which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice," in all the nameless catalogue of indecencies which go towards filling judicial reports and which must be read for accurate knowledge of the law, and "reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged," said a Wisconsin Chief Justice.<sup>15</sup> But "are we to set ourselves to the vain task of attempting to turn backward the wheel of time," and are we "to say at this time of day that a woman shall not be permitted to pursue the vocation to which her tastes lead her, and for which her studies have qualified her, to earn her bread in any respectable calling she may elect to pursue, or that the profession of the law is, of all the professions and vocations in the world, the only one from which she shall be excluded—the only tree of knowledge of which she shall not eat?" queried a Pennsylvania judge.<sup>16</sup> Another judge in the same state remarked that there are inherent reasons why woman should be admitted to practice law growing out of the necessities of her fellow-woman, and proceeded as follows: "There are cases involving questions of delicacy, in which woman would rather suffer injustice and wrong than confer with man. There are also questions touching the relations of the wife with the husband, which a wife, from motives of prudence and a sense of wifely propriety, would not communicate to a man, but about which she would feel at liberty to advise with her fellow-woman."<sup>17</sup> Admission of women to the bar would constitute an "inversion, so to speak, of the order of

"Whether . . . to engage in the hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, would not tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her, is a matter certainly worthy of her consideration." Per Mr. Justice Lawrence in *In re Bradwell*, 55 Ill. 535, 542.

"To wrangle at *nisi prius* and engage in scenes inconsistent with the

character of her sex." Per Lord Campbell, C. J., in *Cobbett v. Hudson*, 15 Q. B. 988, 69 E. C. L. 988.

<sup>15</sup> Chief Justice Ryan in *Matter of Goodell*, 39 Wis. 232, 246, 20 Am. Rep. 42.

<sup>16</sup> Per Thayer, P. J., in *Matter of Kilgore*, 14 W. N. C. (Pa.) 466, 470.

<sup>17</sup> Per Peirce, J., dissenting in *Matter of Kilgore*, 17 Phila. (Pa.) 14, 17, 41 Leg. Int. 104.

nature,"<sup>18</sup> would tend toward "a sweeping revolution of social order,"<sup>19</sup> some judges have said. But "such persons should awake from their slumbers," for "the revolution is over," and "its results exist to-day everywhere and all around us, and have existed long enough for a moral philosopher to write its history."<sup>1</sup> One Pennsylvania judge was fearful that the advent of women to the bar would "produce an unnatural competition between the sexes, and what is worse a condition of society wherein worthless husbands, fathers, sons, and brothers will depend upon the exertions of those who ought to receive and enjoy that protection which nature intended."<sup>2</sup> But "I do not apprehend much danger of the bar becoming overrun with female attorneys. If it does it will but prove that they make the best lawyers, and will show the wisdom of the rule admitting them," said another judge in the same state. "Lawyers of a few years' standing at the bar," he continued, "will be able to recall many instances in their practice where the services of a sensible female attorney would have been of great benefit to their clients."<sup>3</sup> "I do not know that the inno-

<sup>18</sup> *Matter of Kilgore*, 14 W. N. C. (Pa.) 255, 256, per Ludlow, P. J.

"I have been at the bar and in the military service, and my experience leads me to the conclusion that women are as well fitted for the one as for the other. . . . Woman as a soldier would have little to do besides marching, shooting, and being shot. It is said that a well-read, intelligent, honest woman will make a better attorney than an ignorant, vicious unscrupulous man. This is true; but it is equally true that a healthy, active woman will make a better soldier than a decrepit man." *Lockwood v. U. S.*, 9 Ct. Cl. 346, 354, 355, per Judge Nott.

<sup>19</sup> Per Chief Justice Ryan in *Matter of Goodell*, 39 Wis. 232, 243, 20 Am. Rep. 42.

<sup>1</sup> Per Thayer, P. J., in *Matter of Kilgore*, 14 W. N. C. (Pa.) 466, 470.

<sup>2</sup> *Matter of Kilgore*, 14 W. N. C. (Pa.) 255, 256, per Ludlow, P. J.

<sup>3</sup> Per Clayton, P. J., in *Matter of Kilgore*, 17 Phila. (Pa.) 615, 616, 41 Leg. Int. 242.

"If the practice of the law by them is not found agreeable, lucrative, or expedient, they will not seek it, and if it tends to enlarge their sphere of usefulness, or to elevate and refine the bar, it ought certainly to be encouraged. Women now preach the gospel, govern colleges, practice medicine, act as school directors, notaries public, justices of the peace, and in many other ways are filling positions which were not open to them until within a few years. . . . Montgomery county cannot afford to be behind in any movement that will open a new and honorable field for woman's labor, or increase her opportunities for advancement." Per

vation will have very extensive consequences in any direction,"<sup>4</sup> appears to be a fitting conclusion of this symposium. It was remarked in a New Hampshire case that "secrets involving all that renders life valuable are confined to them (attorneys) upon the mere security and belief that they will not violate a professional confidence."<sup>5</sup> Mr. Justice Brewer said that "it is the glory of our profession that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation, with the absolute assurance that that lawyer's tongue is tied from ever disclosing it."<sup>6</sup> In some of the statutes it is declared to be the duty of attorneys "to maintain inviolate the confidence, and at every peril to themselves to preserve the secrets, of their clients."<sup>7</sup> Curiously enough, in view of the professional duty thus emphatically stated, while courts have gone to the limit of their wits in quest of arguments against the expediency of admitting women to the bar, it has not occurred to any ingenious and facetious judge to suggest a peculiarly relevant female frailty—if Shakespeare's authority is sterling:

*Portia*.—I have a man's mind, but a woman's might.

How hard it is for women to keep counsel!

*Julius Cæsar*, Act II., sc. 4.

### *Education.*

§ 41. **General Education.**—No one can profitably enter upon a course of legal studies until he has at least a well-grounded English education, and his mind is well stored with general knowledge and information.<sup>8</sup> Proof that an applicant for admission to the bar had a good general education before he entered upon the study of law, or has it when examined for admission, is now expressly required by statute or rule of court in nearly all of the

Weand, C. J., in *Richardson's Case*, 3 Pa. Dist. Ct. 299, 301.

<sup>4</sup> Per Hare, P. C., granting the applicant's motion for admission to the bar, in *Matter of Kilgore*, 17 W. N. C. (Pa.) 563.

<sup>5</sup> *Bryant's Case*, 24 N. H. 149, 158, per Gilchrist, C. J.

<sup>6</sup> U. S. v. Costen, 38 Fed. 24.

<sup>7</sup> See § 92 et seq.

<sup>8</sup> *Matter of Pratt*, 13 How. Pr. (N. Y.) 1, 3.



states; and such requirements are strictly adhered to.<sup>9</sup> A reasonably strict construction is placed upon statutory provisions designed

<sup>9</sup> Anonymous, 3 Wend. (N. Y.) 456; Applications for Admission to Practice, 14 S. D. 429, 85 N. W. 992.

The rules of the *Michigan* state board of law examiners, requiring applicants to be examined in the studies ordinarily required for graduation from high schools, in the absence of showing of such graduation, etc., is a reasonable exercise of the board's power to determine the general qualifications of applicants. In re Alexander, 167 Mich. 495, 133 N. W. 491.

Uniform and strict enforcement of the rule is necessary to fulfil its purpose. Matter of Moore, 108 N. Y. 280, 15 N. E. 369, wherein the court said: "It was clearly its intention, by requiring certain intellectual qualifications on the part of students when commencing their course of legal studies, to insure, as far as possible, the attainment of the ability required, when finally licensed by the court, to perform the responsible and important duty of advising clients as to their legal rights and duties." See also Matter of Warde, 154 N. Y. 342, 48 N. E. 513.

*New York*.—Rule 4 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "All candidates for admission to the bar upon examination, except applicants in the third class mentioned in rule 3 (*i. e.*, persons who have been admitted and have practiced three years in another state or country), must have pursued a preliminary course of study evidenced by graduation from a college

or university, or by passing a regents' examination or the equivalent, as hereinafter prescribed. Applicants who are not graduates of a college or university, subject to the limitations and requirements hereinafter in this subdivision expressed, or members of the bar as above described, before entering upon the clerkship or attendance at a law school herein prescribed shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the university; and shall have filed a certificate of such fact, signed by the commissioner of education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate, properly authenticated, of having successfully completed a full year's course of study in any college or university; second, a certificate, properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the regents as maintaining a satisfactory academic standard; or, third, a regents' diploma. All graduates of a college or university existing under the government

to raise the standard of qualifications, in order to promote the purposes of their enactment.<sup>10</sup>

**§ 42. Purpose of Statutory Requirements.** — Attorneys are licensed because of their learning and ability, so that they may not only protect the rights and interests of their clients, but be able to assist the court in the trial of the cause.<sup>11</sup> Proper qualifications to practice law are, therefore, necessary to protect the courts, the public, and the profession against the admission of incompetent or unworthy members.<sup>12</sup> Statutes prescribing educational qualifications for admission to the bar are enacted in a spirit of liberality towards suitors, and for their protection against the practices of any one who might seduce their confidence and induce them to trust him in the management of important interests, when suitors could not possibly ascertain the skill and qualifications of those in whom they confided, or their acquaintance with the most intricate, difficult and important of human sciences.<sup>13</sup> Federal courts will follow the construction given by the highest court of a state

or laws of any foreign country other than those where English is the language of the people, and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries, shall pass the regents' examination in second year English. The regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the regents' examination, as the same shall appear upon said certificate."

<sup>10</sup> *In re Admission to Bar*, 61 Neb. 58, 84 N. W. 611; *Matter of Moore*, 108 N. Y. 280, 15 N. E. 369; *Matter of Mason*, 140 N. Y. 658, 35 N. E. 654; *Matter of Klein*, 155 N. Y. 606, 50 N. E. 1119; *Matter of Caruthers*, 158 N. Y. 131, 52 N. E. 742; *Matter of Simpson*, 167 N. Y. 403, 60 N. E. 747.

<sup>11</sup> *Cobb v. Judge*, 43 Mich. 239, 291, 5 N. W. 309, per Marston, C. J.

<sup>12</sup> *Ex p. Coleman*, 54 Ark. 235, 15 S. W. 470.

"Restrictions upon the privilege of practicing law are created only in the interest of the public welfare, and neither for nor against the student." Per Cartwright, C. J., in *In re Day*, 181 Ill. 73, 94, 54 N. E. 646, 50 L.R.A. 519.

<sup>13</sup> Per Mr. Justice Scates in *Robb v. Smith*, 4 Ill. 47.

A New York judge, speaking in 1862, said: "Among the numerous incompetent persons whom we are compelled to see in the courts, invested with the character of lawyers under the present constitution, which has made it substantially impossible to keep anybody out, and with the Code of Procedure, which is supposed to render its practice perfectly easy, like the acquisition of languages un-

to the statutes of that state regulating the granting of licenses to practice law.<sup>14</sup>

**§ 43. Indiana Constitutional Provision.**—A section in the Indiana Constitution provides that "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." At the general election in November, 1900, a proposed amendment that "the General Assembly shall by law prescribe what qualifications shall be necessary for admission to practice law in all courts of justice," was submitted to the electors. Nearly 100,000 more votes were cast for the amendment than against it. But it did not receive a majority of the votes cast for presidential electors and governor. The Supreme Court held that it had not been carried by the constitutional majority required for the ratification of a proposed amendment, and therefore that an applicant for admission to the bar could not be required to submit to an examination as to his mental qualifications, although a statute provided (and still provides) therefor.<sup>15</sup>

**§ 44. Study in Law School.**—In most, if not all, jurisdictions a law student is allowed to pursue his legal studies in a law school, and will be given due credit therewith upon his examination;<sup>16</sup> but such study is not obligatory. Nor is it necessary to

der certain systems without a master and without study, it would be very unwise to relax any of the protection to suitors and to the administration of justice, which were found necessary in better days." Per Emott, J., in *Richardson v. Brooklyn, etc., R. Co.*, 22 How. Pr. 368, 371.

<sup>14</sup> *In re Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 U. S. (L. ed.) 929.

<sup>15</sup> *In re Denny*, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722 (decided by divided court).

<sup>16</sup> See *In re Admission to Bar*, 61 Neb. 58, 84 N. W. 611; *In re New*

*York Law School*, 190 N. Y. 215, 83 N. E. 17.

The local rules in each jurisdiction must be consulted for definite information on this point.

*New York.*—Rule 5 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "The provisions of these rules for study at a law school must be fulfilled by good and regular attendance and successfully completing the prescribed course of instruction at an incorporated law school, or a law school connected with an incorporated college or university, having

graduate, or to receive a degree, from a law school. Thus a certificate showing that a student had successfully completed the prescribed course of instruction during a certain period was held to be sufficient.<sup>17</sup> An application for admission to the bar of Allegheny county, Pennsylvania, containing a statement of graduation at the law department of Yale University, was pronounced defective because "lacking in precision of dates to show how much time" the applicant passed there.<sup>18</sup> It is quite certain that a merely honorary degree of bachelor of laws would not constitute a "diploma," under the terms of any of the state statutes employing that word in regulations for admission to the bar. Thus by construction of Louisiana statutes, it was held that a resolution passed by the executive authorities of a university directing its president to confer the degree of bachelor of laws upon persons named, and issue to them the usual diplomas, did not alone operate to confer the degrees or grant the diplomas.<sup>19</sup> An ambiguity in a statutory provision shortening the term of study or service for the benefit of graduates of a recognized law school ought to be resolved in favor of the applicant.<sup>20</sup>

**§ 45. Study in Law Office.** — In some jurisdictions it is still absolutely necessary for a student to spend at least a portion of his

a law department organized with competent instructors and professors, in which instruction as hereinafter provided is regularly given. Good and regular attendance upon and the successful completion of the prescribed course of instruction at a law school, the school year of which shall consist of not less than thirty-two school weeks, exclusive of vacations, in which not less than ten hours of attendance upon law lectures or recitations of such prescribed course, to be given or conducted by regular members of the faculty, are required in each week, shall be deemed a year's attendance under this rule. The same period of time shall not be duplicated for different pur-

poses; except that a student attending a law school, as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules."

<sup>17</sup> *Matter of New York Law School*, 190 N. Y. 215, 83 N. E. 17.

<sup>18</sup> *Musgrave's Case*, 216 Pa. St. 598, 603, 66 Atl. 84.

<sup>19</sup> *State v. Marks*, 30 La. Ann. 97.

<sup>20</sup> *Calder v. Law Society*, 9 British Columbia 56, *disapproving* *King v. Law Society*, 8 British Columbia 356.

time in the office of an attorney, in order that he may be eligible to take the examinations for admission to the bar. And in all jurisdictions it seems that such study may, of itself, be sufficient, if pursued in accordance with the local rules governing the subject, to entitle the student to examination and admission.<sup>1</sup> Studying law, no matter how diligently, is not the equivalent of a regular clerkship required by statute or a rule of court.<sup>2</sup> An applicant who had graduated at the Harvard Law School, after three years of study, was denied admission to the bar because he had not complied with a rule requiring at least a year of study in the office of a practicing attorney.<sup>3</sup> In Nebraska the only exception made to the requirement of the statute for two years' study in the office of a practicing attorney, is in the case of regular graduates of the College of Law of the University of Nebraska; there is no exception in favor of the graduates of any other school of law.<sup>4</sup> A statutory requirement, as a condition to the granting of a license, that the applicant shall obtain a certificate from attorneys that he

<sup>1</sup> It has been said that "nothing short of thorough study and training, and that too in the office of a practicing attorney, will ever make a lawyer. As well might the surgeon become qualified to practice his profession away from the subject, the mechanic to acquire his art by the abstract study of his trade, or the chemist away from his laboratory, as the legal student to become qualified to practice by merely reading, without practical office education." *Matter of Pratt*, 13 How. Pr. (N. Y.) 1, 3.

*New York*.—Rule 6 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "The provisions of these rules for studying law by the service of a regular clerkship must be fulfilled by serving such clerkship in the office of a practicing attorney of the Supreme Court in this state, after

the candidate has attained the age of eighteen years. It shall be the duty of attorneys, with whom the clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year. In computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as a part of such year."

<sup>2</sup> *Dunn's Application*, 43 N. J. L. 359, 39 Am. Rep. 600; *In re A. B.*, 3 Johns. (N. Y.) 261, 4 Johns. 191.

<sup>3</sup> *McPherson's Case*, 5 Pa. Dist. Ct. 22.

<sup>4</sup> *In re Admission to the Bar*, 61 Neb. 58, 82 N. W. 611.

has been engaged in the study of law, etc., cannot be waived by an examining committee or by the court.<sup>5</sup> When it appears on the face of an application that the applicant has not been duly registered nor served a clerkship as required by the rules, the court will not refer the application to the board of examiners.<sup>6</sup> A rule requiring study for a stated period "in the office of an attorney and counselor at law" demands that the study of law during ordinary business hours in a law office must be the student's chief occupation. Other employment may be undertaken out of office hours or in vacation, but other continuous employment during the business hours of the day is not compatible with such a course of study as is contemplated by the rule.<sup>7</sup> A rule of court requiring that an applicant for admission to the bar shall have served a regular clerkship with some practicing attorney for a stated period, is not satisfied by merely studying and reporting frequently to the attorney, and devoting a modicum of time to clerical work in the office.<sup>8</sup> A clerkship to an attorney imports the office of assistant to an attorney, an actual occupation in and about the attorney's business and under his control. The service is to be rendered, not solely or mainly by the study of law-books, but chiefly by attending to the work of the attorney under his direction. The purpose of the rule is that the clerk shall be actually engaged

<sup>5</sup> *People v. Carr*, 21 Colo. 525, 43 Pac. 128, upholding the refusal of a committee to admit an applicant to examination where he presented no certificate, although the refusal was not based upon that ground.

<sup>6</sup> *Wilson's Application*, 9 Pa. Dist. Ct. 102.

<sup>7</sup> *In re Bosworth*, 28 R. I. 462, 68 Atl. 316.

<sup>8</sup> *In re Dunn*, 43 N. J. L. 359, 39 Am. Rep. 600, wherein the court said: "The rule is a very old one in this state. It is found among the rules as revised at February Term, 1805, and printed in Coxe, p. vi. No doubt it was derived from the English statutes of 2 Geo. II., chaps. 23, 46, which required similar service.

Under these acts, the King's Bench struck an attorney's name from the roll because it appeared that he had not, during the whole time of his preliminary clerkship, been actually employed by the attorney to whom he was articulated in the proper business, practice or employment of an attorney. *In re Taylor*, 6 Dowl. & R. (Eng.) 428. And in *Ex parte Hill*, 7 T. R. (Eng.) 452, and *In re Smith*, 10 Jur. N. S. (Eng.) 39, the alleged service was deemed insufficient because not rendered at the place of business of the master, or one presided over by him or some partner or managing clerk representing him, and competent to instruct the applicant."

in the practice of law under the guidance of his master for the stated period, so that by direct contact with an attorney's duties he may acquire the skill and facility in the profession which are necessary for enabling him to protect and promote independently the interests that clients may afterwards commit to him. This is the sole object of requiring the clerkship to be served with a practicing attorney.<sup>9</sup> In Pennsylvania a rule of the Court of Common Pleas provided that "no person shall be admitted to practice . . . unless he shall have served a regular clerkship, within the state, to some attorney or gentleman of known abilities," etc.; and it was held that serving a clerkship with a judge of the Supreme Court was a sufficient compliance with the rule.<sup>10</sup> In an English case deciding that the service of an articled clerk had been sufficiently subject to supervision, the court said: "Unquestionably the supervision and personal superintendence of the master is essential to good service; but these matters must be considered with relation to the particular circumstances of each case."<sup>11</sup> In Nebraska a statutory provision requiring two years' study "in the office of a practicing attorney" was construed to mean an attorney residing and practicing in Nebraska; for the reason that, (1) such an attorney is an officer of the Nebraska court, whose standing and character is or easily may be known to the court, (2) he owes to the Nebraska court a duty which is not obligatory upon the attorneys of another state, and (3) a certificate of such attorney, as the preceptor of the applicant, which is required by the rules of court will be made under the sanction of his official oath.<sup>12</sup> In the computation of time for clerkship the New York Supreme Court called four terms a year, but insisted on the full number of terms in fact, without allowing the filing of a certificate in vacation to relate to a previous term.<sup>13</sup> In an early case in New York it was announced that if a person commencing a clerkship in an attorney's office is entitled to an allowance for classical studies, such allowance must be ascertained and settled by one of the

<sup>9</sup> *Per* Dixon, J., in *In re Dunn*, 43 N. J. L. 359, 39 Am. Rep. 800.

*Duncan*, 10 Jur. N. S. (Eng.) 939.

<sup>12</sup> *In re Admission to the Bar*, 61

<sup>10</sup> *Com. v. Judges*, 1 S. & R. (Pa.) 187.

Neb. 58, 82 N. W. 611.

<sup>13</sup> *Ex p. Sayre*, 7 Cow. (N. Y.) 368.

<sup>11</sup> *Per Cockburn, C. J.*, in *In re*

judges at the commencement of the clerkship, and will not be inquired into by the court when application is made for examination, and that if special circumstances exist, excusing the omission, application should be made to one of the judges in vacation, and not to the court during term.<sup>14</sup> In some states, however, no law office experience is required.

### *Examination.*

§ 46. *Necessity of Examination.* — The examination of applicants for admission to the bar is an absolute necessity in order to determine whether they possess the required qualifications, especially with respect to their education, general and legal. Therefore every state provides in some appropriate manner for such examination.<sup>15</sup> In Indiana, however, it seems that such an exam-

<sup>14</sup> Anonymous, 3 Wend. (N. Y.) 456.

<sup>15</sup> See *In re Branch*, 70 N. J. L. 537, 57 Atl. 431; *In re Brewer*, 3 How. Pr. (N. Y.) 169.

*New York.*—"The Court of Appeals may from time to time make, alter, and amend rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counselors at law to practice in all the courts of record of the state." Sec. 53, Judiciary Law, Consol. Laws of New York.

"There shall be examinations of all persons applying for admission to practice as attorneys and counselors at law at least twice in each year in each judicial department, and at such other times and places as the Court of Appeals may direct." Sec. 402, Judiciary Law, Consol. Laws of New York.

"Every person applying for examination for admission to practice as an attorney and counselor at law

shall pay such fee, not to exceed fifteen dollars, as may be fixed by the Court of Appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations." Sec. 465, Judiciary Law, Consol. Laws of New York.

Rule 3 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "Three classes of persons may be admitted to the bar upon examination:

"1. Persons who are not graduates of a college or university;

"2. Persons who are graduates of a college or university; and

"3. Persons who have been admitted as attorneys and have practiced three years in another state or country.

"In each class the applicant must prove by his own affidavit to the satisfaction of the state board of law examiners that he is a citizen of the United States, twenty-one



ination, though provided for by statute, cannot be enforced because of a peculiar constitutional provision in this respect.<sup>16</sup> The constitution of New Jersey preserves to the Supreme Court its ancient power to examine those whom it recommends to the governor for his license to practice law, and this power in relation to such recommendation and mode of appointment is not subject to derogation by the legislature. Hence a statute dispensing, in respect of a certain class of applicants, with a part of the examination required by the rules of the court, was pronounced unconstitutional.<sup>17</sup>

years of age, stating his age, and an actual and not a constructive resident of the state for not less than six months immediately preceding, and that he has not been examined for admission to practice and been refused admission within four months, and that he has studied law in the manner and according to the conditions in these rules prescribed. Applicants in the first class (*i. e.*, persons who are not graduates of a college or university) must have studied law for a period of four years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or partly by serving such clerkship and partly by attending a law school; but every such applicant must serve such clerkship for a period of at least one year continuously either before examination by the state board of law examiners or after such examination and prior to admission to the bar. Applicants in the second class (*i. e.*, persons who are graduates of a college or university) must have studied law for a period of three years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or wholly by attending a law school; or partly

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by serving such clerkship and partly by attending a law school. Applicants in the third class (*i. e.*, persons who have been admitted as attorneys and have practiced three years in another state or country) must have studied law for a period of one year within this state and pursue such course of study either by serving a clerkship or by attendance upon a law school as the applicant may elect."

Rule 2 of the rules of the state board of law examiners provides: "Each applicant must be a citizen of the state, of full age; he may be examined in any department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the Appellate Division of the Judicial Department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the department in which he resides. Note: An applicant must appear for examination in the department in which he entitles his papers, unless permission of the board otherwise be granted at least fifteen days before the day appointed for holding the examination."

<sup>16</sup> See § 43.

<sup>17</sup> *In re Branch*, 70 N. J. L. 537, 57 Atl. 431.

But one who has been duly admitted to practice by an inferior state court, pursuant to legislation which entitles him to be admitted to practice in the highest court of the state without further examination, acquires a vested right of which he cannot be deprived by subsequent legislation providing for examination as a condition of admission to the highest court.<sup>18</sup>

**§ 47. Who Conducts Examinations.** — The examination of applicants for admission to the bar was formerly almost exclusively within the supervision of the courts, and it is still so where it has not been made the subject of statutory regulation. The old custom was, as it is now in some jurisdictions, for the court to appoint a board of examiners, who served gratuitously, before whom the applicants appeared and submitted their qualifications to the test provided for them. In the majority of the states, however, the complexity resulting from the growth of litigation, as well as the increase of general business, and of the population, rendered essential a systematic and careful selection of those who were to be honored with the privilege of being allowed to practice law. To this end, therefore, either under statute or rules of court, every state provides either a board or committee, or some other equally appropriate body, for the purpose of conducting the examination of law students. In some of the states applicants for license to practice law are examined by the highest court in the state, in a few by a judge or the judges of lower courts, aided or unaided by a committee of lawyers, and in a majority of states the examination is conducted by boards of practicing lawyers, whose appointment is provided for in various ways by legislative enactment, but is usually vested in the governor or the court of last resort.<sup>19</sup> In most jurisdictions the examinations are, to a large extent at least,

<sup>18</sup> *In re Helwig*, 5 S. D. 272, 58 N. W. 674; *In re Application for Admission to Practice*, 14 S. D. 429, 85 N. W. 992.

<sup>19</sup> See the various states enumerated by Clark, C. J., in *In re Applicants for License*, 143 N. C. 1, 18,

10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A.(N.S.) 288. See also *In re O'Brien*, 79 Conn. 46, 63 Atl. 777; *People v. Betts*, 7 Colo. 453, 4 Pac. 42; *In re Application for Admission to Practice*, 14 S. D. 429, 84 N. W. 992.

regulated by the court rules, either with or without legislative authority;<sup>20</sup> indeed, some courts have held that undue legislative

<sup>20</sup> *New York*.—"The state board of law examiners is continued. Said board shall consist of three members of the bar, of at least ten years' standing, who shall be appointed, from time to time, by the Court of Appeals, and shall hold office as a member of such board for a term of three years, and until the appointment of his successor." Sec. 461, Judiciary Law, Consol. Laws of New York.

"The members of the state board of law examiners shall be appointed from time to time, by the Court of Appeals, as provided in section four hundred and sixty-one of this chapter. The Court of Appeals shall fix the compensation of the members of the said board." Sec. 56, Judiciary Law, Consol. Laws of New York.

"Upon the certificate of the state board of law examiners, that a person has passed the required examination, if the Appellate Division of the Supreme Court in the department in which such person lives shall find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counselor in all courts of the state." Sec. 88, Judiciary Law, Consol. Laws of New York.

"The state board of law examiners shall certify to the Appellate Division of the Supreme Court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such person shall have in other respects complied with the

rules regulating admission to practice as attorneys and counselors, which fact shall be determined by said board before examination. Sec. 463, Judiciary Law, Consol. Laws of New York."

Rule 7 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "The state board of law examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

"First. That the applicant is a college graduate, by the production of his diploma, or certificate of graduation, under the seal of the college.

"Second. That he has been admitted to the bar of another state or country, by the production of his license, or certificate, executed by the proper authorities.

"Third. In all cases where the service of a clerkship is required, that he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this state, after the age of eighteen years, by producing and filing with the board a certified copy of the attorney's certificate, as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any

interference with the court's supervision in this respect will not be tolerated.<sup>1</sup> An examination which is required to be made by a

one year. Both of said affidavits must be to the effect that during the entire period of such clerkship, except during the stated vacation time, the applicant was actually employed by said attorney as a regular law clerk and student in his law office, and under his direction and advice, engaged in the practical work of the office during the usual business hours of the day.

"Fourth. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school. Said certificate and affidavit must also show that the law school prescribes the course of instruction contemplated by these rules, and each shall also contain the statement that said applicant took the prescribed course of instruction required at said school for the degree of bachelor of laws while in attendance thereat, and bona fide took and successfully passed all examinations in all the subjects required for said degree during such period of attendance, in each case specifying the subjects in which said applicant took and passed his examinations as aforesaid, which proof must be satisfactory to the board of examiners.

"Fifth. That the applicant has passed the regents' examination, or its equivalent, must be proved by the

production of a certified copy of the regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

"Sixth. When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost, or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the board of law examiners may accept such other proof of the requisite facts as they shall deem sufficient.

"Seventh. A law student whose clerkship, or attendance at a law school, has already begun, as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his option, file or produce, instead of the proofs required by these rules, those required by the rules of the Court of Appeals in force June 1, 1908."

<sup>1</sup> See §§ 28, 29. See also *In re Branch*, 70 N. J. L. 537, 57 Atl. 431.

The function of determining whether one who seeks to become an officer of the courts and to conduct causes therein is sufficiently acquainted with the rules established by the legislature and the courts, governing the rights of parties, and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact.

committee should not be conducted by one member thereof alone. The examination of an individual committeeman may be thorough and satisfactory, and his conclusions in the premises may be eminently just and accurate, but its acceptance and indorsement by his associates is not sufficient.<sup>3</sup> By construction of the Colorado statutes an examination for admission to the bar can be made only by the committee of the district in which the applicant resides;<sup>3</sup> and the Supreme Court of that state revoked a license that it had granted to an applicant, when it appeared that his certificate of legal proficiency was not obtained in accordance with law, an irregularity which would have prevented the issuance of the license if the court had been aware of it.<sup>4</sup>

**§ 48. Examining Boards.** — In Florida a statute creating a board of legal examiners to be appointed by the Supreme Court, empowering them to examine applicants for admission to the bar in respect to their intellectual, moral, and professional qualifications, and providing that the board's certificate of fitness "shall entitle" an applicant "to practice law in all the courts of the

and to bring the facts and law before the court so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualifications, under such restrictions and limitations as may be properly imposed by the legislature for the protection and welfare of the public. The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519.

<sup>3</sup> *People v. Betts*, 7 Colo. 453, 456, 4 Pac. 42, per Helm, J.; *People v. Carr*, 21 Colo. 525, 43 Pac. 128.

<sup>3</sup> *People v. Betts*, 7 Colo. 453, 4 Pac. 42, wherein the court said: "The labor of those who serve upon these committees is entirely gratuitous, and it would be unreasonable and unfair to impose upon one committee the duty of examining students from all parts of the state. . . . It was hardly the legislative intention to give each candidate the privilege of choosing from among the seven different committees the one in his judgment most likely to favor his application; the one made up of acquaintances or personal friends, or perchance the one most lax in its method of examination and in the attainments required."

<sup>4</sup> *People v. Betts*, 7 Colo. 453, 4 Pac. 42.

state," was declared invalid because the members of the board were officers that the Constitution required to be elected by the people or appointed by the governor.<sup>5</sup> Where a state board of law examiners is authorized by statute to "make such rules and regulations relative to such examination as to them may seem proper," a large discretion is thereby invested in the board as to the rules and regulations it may make and the details pertaining thereto; and the exercise of this discretion will in no case be reviewed by a court unless it should clearly appear that an abuse has occurred.<sup>6</sup> A standing committee appointed by a court, pursuant to statutory provision, for examining applicants for admission to the bar, may, for their own convenience as to time, and to relieve themselves of unnecessary labor, without surrendering to others the exercise of their own judgment, make such rules and regulations for the examination of applicants as will not materially interfere with or prejudice the rights of the latter.<sup>7</sup> For example, if the statute provides that no license shall be granted by the court until the applicant has obtained a certificate from attorneys that he has been engaged in the study of law for a specified period, the standing committee may make and enforce a rule that he shall not be entitled to an examination by them until he presents such certificate.<sup>8</sup> A rule of a board of examiners adopted at a regular meeting and entered on its minutes cannot be effectually modified by a subsequent agreement of its members who are waited upon individually for an expression of their views.<sup>9</sup>

**§ 49. Examination of Law School Graduates.**— In some states laws have been enacted whereby the graduates of certain

<sup>5</sup> *State v. Hocker*, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

<sup>6</sup> *Mitchell v. State Board of Law Examiners*, 155 Mich. 452, 119 N. W. 587, wherein the court said: "The results of the work of this board under the statute in elevating the standard of proficiency in the knowledge of the law of those who seek to be admitted to practice the profession in this state has been highly beneficial."

<sup>7</sup> *People v. Carr*, 21 Colo. 525, 43 Pac. 128.

<sup>8</sup> *People v. Carr*, 21 Colo. 525, 43 Pac. 128. "For it would be a waste of time," said the court, "and entail unnecessary labor upon the committee, to examine applicants who, if they succeeded therein, nevertheless would not be entitled to a license."

<sup>9</sup> *McPherson's Case*, 5 Pa. Dist. Ct. 22.

law schools are entitled to admission to the bar without an examination; the mere presentation of their diploma being in itself sufficient evidence of the applicant's knowledge of the law. Thus in California the act of the legislature creating Hastings College of the Law in the University of California required the college to affiliate with the university and provided that a student's diploma shall entitle him to a license to practice in all the courts of the state, subject to the right of the chief justice of the state to order an examination as in ordinary cases. By later legislation the several district courts of appeal have exclusive power to grant licenses to practice law; and it has been held that an applicant presenting to that court a diploma of the Hastings College of Law must be admitted without an examination by that court, and without inquiring whether or not the college has, as a matter of law, affiliated with the university, or whether or not the faculty of the university has granted the diploma which the applicant holds.<sup>10</sup> A similar statute was enacted in Louisiana.<sup>11</sup> A New York statute making the diploma of the law school of Columbia college conclusive evidence of the learning and ability of its possessor, was held to be valid under a provision in the constitution of 1846 entitling certain persons to admission to the bar "who possess the requisite qualifications of learning and ability."<sup>12</sup> Statutes of

<sup>10</sup> *In re Students, etc.*, (Cal.) 110 Pac. 341.

<sup>11</sup> *State v. Marks*, 30 La. Ann. 97.

Graduates of the law department of the University of Louisiana must obtain a license from the Supreme Court before they are entitled to practice as attorneys at law in any court of the state. The statute does not make their diploma the equivalent of a license. An order of the Supreme Court, however, admitting one to practice in all the courts of the state, is equivalent to the required license. *In re Villeré*, 33 La. Ann. 998.

<sup>12</sup> *Matter of Cooper*, 22 N. Y. 67, 93, 11 Abb. Pr. 301, wherein the court said: "The legislature might have provided that the affidavit of the

[applicant] should be evidence upon the question of age, or the certificate of some public officer upon that of citizenship. There is no substantial difference, in respect to the power of the legislature, between such cases and that under consideration. The diploma simply proves that the applicant has the requisite learning and ability, but leaves the facts in regard to the length of study, the age, citizenship, etc., of the applicant, to be inquired into and passed upon by the court in determining the question of admission."

This statute is not now in force, see § 56 N. Y. Code Civ. Pro., and §§ 53, 56, 88, 460-465, 467, title Judiciary, Consol. Laws of New York.

the character under consideration have not, however, met with unanimous judicial approval; thus in speaking of statutory provisions partly exempting graduates of certain law schools from the operation of some of the rules of court regulating applications for admission to the bar, it was said that "this legislation has manifestly been enacted to favor the fortunate class of persons who may be able to secure admission to the legal profession through the easy avenues of the law school, while those who are not so prosperously situated are required to pass their three years of laborious preparation in the office of a practicing attorney;" that the discrimination is neither just nor fair; that "discriminations of this nature are not in harmony with the policy of the law or the institutions of the state;" and that "they create invidious distinctions, and are justly liable to be regarded as harsh and uncharitable to persons who are incapable of availing themselves of the privileges secured by such laws."<sup>13</sup> An Illinois statute gave to persons presenting diplomas from certain law schools the right to admission to the bar without the examination required of other applicants. "No course of study is prescribed for the law school, but a diploma granted upon the completion of any sort of course its managers prescribe is all-sufficient," was the court's summary statement of the statutory provisions. The enactment was declared invalid because it was "clearly class legislation, prohibited by the constitution" of Ohio, and because it "assumed the exercise of a power properly belonging to the courts,"<sup>14</sup> under the constitution of the state.<sup>15</sup> A ruling to the same effect was

<sup>13</sup> Per Mr. Justice Daniels, in *Matter of Burchard*, 27 Hun (N. Y.) 429, 438.

<sup>14</sup> See §§ 28, 29.

<sup>15</sup> In *re Day*, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519 (by a divided court), holding that no graduates of a law school, unless they were bearers of foreign licenses to practice, could be admitted without proof of preliminary general education and passing examination as required by the rules of the Supreme Court. Chief Justice Cartwright said: "Whatever

may have been the propriety of the [earlier] rule admitting the holder of a diploma issued by a law school to practice, in view of the law schools existing at its adoption, the rule had become an alarming menace to the administration of justice. . . . Persons were admitted who had been only nominally in attendance for the stipulated period of time upon schools of a very different grade. There was no state supervision of law schools, and any person who saw fit could organize a law school, and by adver-



made in New Jersey<sup>16</sup> in a case arising under a similar statute.

**§ 50. Character of Examination.**— The character of the examination which shall be adopted to test the student's knowledge must, of necessity, be largely discretionary with the examiners. Thus they may, and do, require examinations to be exclusively written, or entirely oral, or a combination of both. A positive statutory requirement, or rule of court, would, of course, bind the examiners in this as in all other respects. The subjects upon which the applicant must be examined are, especially of late years, fixed by rule of court, or a rule of the board of examiners, or, in some instances, by statute.<sup>17</sup> Under statutes or

tising that the diplomas admitted to the bar could obtain students. The language of the proviso, 'any law school regularly organized under the laws of this state,' is mere sound and means nothing. . . . In view of the disastrous consequences to the profession and the public, the rule by which it was only a step from the diploma mill to the bar was changed, and, in an effort to discharge a duty to the public, the general standard of admission was raised."

<sup>16</sup> *In re Branch*, 70 N. J. L. 537, 57 Atl. 431.

<sup>17</sup> Thus the *Alabama* Code, 1907, § 2973, provides as follows: "The members of the board shall, at such meetings, propound in writing, to such applicants, a sufficient number of questions to thoroughly test their learning upon the following subjects:

1. Of the law of real property.
2. Of the law of personal property.
3. Of the law of pleading and evidence.
4. Of the commercial law.
5. Of the criminal law.
6. Of chancery and chancery pleadings.

7. Of the statute law of the state.

8. Of professional ethics.

9. Of the constitution of the United States and of the state of Alabama.

10. Of the political history of the United States and of the formation of constitutional governments therein."

See also the Rules of the Superior Court of *Connecticut* adopted December, 1907, and amended June, 1910; No. 4 of the Rules of the Supreme Court of *Vermont* for the Admission of Attorneys, 77 Atl. viii; Rules of the Supreme Court of *Texas*, 96 Tex. 637.

The rule adopted by the *Michigan* board is as follows: "The board of examiners will regard applicants who have received bachelor's degrees from any reputable college or university, as having prima facie the requisite general educational qualifications for admission to the bar. A similar presumption will be made in favor of all graduates of normal or high schools of the state of Michigan, or other reputable institutions of a similar character. A recent teacher's certificate, issued by any board of school

examiners in the state of Michigan for the first grade, or higher, will also be accepted as prima facie evidence of general educational requirements. In the absence of such evidence, to be sent to the secretary with application, candidates for admission to the bar will be examined, before taking the legal examination, in the ordinary studies required for graduation from the high schools of Michigan, and particularly upon the subjects of arithmetic, grammar, elementary algebra, general, American and English history, civil government, composition and rhetoric, and English literature." *In re Alexander*, 167 Mich. 495, 133 N. W. 491.

*New York*.—Rule 8 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "The examination held by such state board of examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. Every applicant shall be given and required to pass a satisfactory examination in the canons of ethics adopted by the American Bar Association and by the New York State Bar Association. An applicant who has failed to pass one examination cannot again be examined until at least four months after such failure."

Rule 6 of the rules of the state board of law examiners provides: "The board will divide the subjects of examination into two groups, as follows: group one, Pleading and Practice and Evidence; group two, Substantive Law, viz. Real Property, Contracts, Partnership, Negotiable

Paper, Principal and Agent, Principal and Surety, Insurance, Bailments, Sales, Criminal Law, Torts, Wills and Administration, Equity, Corporations, Domestic Relations, Legal Ethics and the Constitutions of New York State and of the United States. Each applicant will be required to obtain the requisite standard in both groups and on his entire paper to entitle him to a certificate from the board. If he obtains the required standard in either group and not on his entire paper he will receive a pass card for the group which he passes and will not be required to be re-examined therein. He will be re-examined in the group in which he failed, or on the entire paper if he failed in both groups, at any subsequent examination for which he is eligible and for which he gives notice as required by these rules. Note: Applicants should file their papers at the earliest possible moment; amendable defects may be discovered, which can be corrected if attended to promptly."

Rule 1 of the rules of the state board of law examiners provides: "Each applicant for examination must file with the secretary of the board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the rules of the Court of Appeals for the admission of attorneys and counselors at law," from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for six months prior to the date of the said examination, giving place, with street and number if any, which

must be made by his own affidavit. Said affidavit must also state that such residence is actual and not constructive. The board in its discretion may order additional proofs of residence to be filed, and may require an applicant to appear in person before it, or some member thereof, and be examined concerning his qualifications to be admitted to the examinations. The examination fee of \$15 must be paid to the treasurer at the time the application for examination is filed. To entitle an applicant to a re-examination, he must notify the secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear, and file with him, at the same time, his own affidavit stating that he is and has been for the six months prior to such examination an actual and not constructive resident of this state, giving the place of such residence, and street and number if any."

Rule 3 of the rules of the state board of law examiners provides: "In applying the provisions of rules 3 and 7 of the rules of the Court of Appeals for the admission of attorneys and counselors at law, the board will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of studies completed by him. In case the college or university is registered with the board of regents of the state of New York as maintaining such standard, the applicant must submit to the board, with his diploma or certificate of graduation, the certificate of the said board of regents to that effect, which will be accepted by this board as *prima facie* evidence of the fact.

Such certificate need not be filed in cases where the board of regents, by a general certificate, has certified to this board that the said college or university maintains a satisfactory college standard leading to the degree with which the applicant graduated. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate."

Rule 4 of the rules of the state board of law examiners provides: "The papers filed by each applicant must be attached together, and there must be indorsed upon them the name of the applicant. The papers must be entitled, 'In the matter of the application of \_\_\_\_\_ for admission to the bar.' Each applicant must state the beginning and the end of each term spent in a law school, his age when he began his attendance upon the law school, as well as the beginning and the end of each vacation that he has had."

Rule 5 of the rules of the state board of law examiners provides: "An applicant who has been admitted to the bar as an attorney in another state or country, and who has remained therein as a practicing attorney for the period of three years, may prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted, or from a county judge in said state, certifying that the applicant had remained in said state or county as a practicing attorney for said period of three years, after he had been admitted as an attorney therein. The signature

rules of court requiring a fixed and extended time of clerkship in the office of a practicing attorney,<sup>18</sup> the severity of a subsequent examination of an applicant might, with safety and propriety, be considerably mitigated. But if possession of the requisite qualifications of learning and ability is alone required, the examination prescribed should be full, complete, and thorough.<sup>19</sup> Where the statute requiring examinations by a standing committee makes no exception in favor of students in or graduates of a law school, there would be no objection to the adoption by the committee of the examination prescribed by the faculty of the school as the examination of the committee; but the determination by the committee of the right of an applicant for a license, be he student or not, must not be made to depend, in any degree, on the judgment of the faculty of the school, however that judgment is ascertained, or however sound it may be, but the granting or withholding of a certificate must be based upon the judgment of the committee, as a result of their independent judgment upon whatever test is made, although their judgment, in the case of a student, may be aided and informed by an examination of the answers to questions propounded by the faculty.<sup>20</sup>

of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court."

The New York Court of Appeals recently instructed the state board of law examiners to so frame the questions propounded to candidates for admission to practice as to permit of a reasoned answer to each question, and so to formulate their questions, whether based upon decided cases or upon statutes, as to ascertain the ability of the candidate to apply his knowledge of legal principles and of statutory rules, and to explain the method of their application by him, rather than to elicit answers the correctness of which will rest upon the candidate's power of memorization.

The court also said that the marking of a candidate should be measured by his reasoning power, and not wholly by the mere correctness of his answers. Order of April 17, 1913, Vol. V. Bench and Bar N. S. (May, 1913) 40.

<sup>18</sup> See § 45.

<sup>19</sup> *In re Pratt*, 13 How. Pr. (N. Y.) 1; *In re New York Law School*, 190 N. Y. 215, 83 N. E. 17.

<sup>20</sup> *People v. Carr*, 21 Colo. 525, 43 Pac. 128, holding that an agreement between the members of the committee that they would give certificates to those students who passed the examination prescribed by the faculty, and withhold certificates from such as failed, could not be sanctioned.

**§ 51. Percentage Required to Pass.** — The percentage necessary to pass the examination is usually fixed at seventy-five. But here also the examiners have a discretionary latitude, unless the passing mark is fixed by statute or rule of court. A rule made by a state board of law examiners that "candidates will be required to answer correctly at least seventy per cent. of all questions upon each subject" is not repugnant to a statutory provision that an applicant "shall be required to answer a minimum of seventy per cent. of the questions given him to entitle him to the certificate of the board," and is indeed a correct interpretation of the statute, for "it was not intended" by the legislature "that a candidate would be considered entitled to admission who had not a passing standing in one-third of the subjects submitted for examination."<sup>1</sup>

**§ 52. Personal Presence of Applicant.** — Statutes which carefully provide for examination of applicants, especially if the examination is to be in open court, fairly import that the examination cannot proceed without the personal presence of the applicant, and a rule of court could not authorize an examination in his absence.<sup>2</sup> Nor would a rule of court providing for examination be relaxed to that extent even if the court had power thus to indulge an applicant.<sup>3</sup>

*Requirements Subsequent to Examination.*

**§ 53. Application for Admission.** — Having passed the examination and received a certificate to that effect, it is still necessary that the student shall be regularly admitted and licensed before he can enter upon the duties of an attorney at law. The

<sup>1</sup> *Mitchell v. State Board of Law Examiners*, 155 Mich. 452, 119 N. W. 587, where the applicant, whose examination was held to have been properly pronounced unsatisfactory, had been examined upon twenty-three different subjects, in fifteen of which his percentage of correct answers was from 70 to 85, and in eight from 20

to 53, so that he was given an average of 62 per cent.

<sup>2</sup> *Ex p. Snelling*, 44 Cal. 553, where the court declined to depart from its rule because of a physical injury sustained by the applicant which temporarily prevented his personal appearance.

<sup>3</sup> *Ex p. Snelling*, 44 Cal. 553.

usual procedure for this purpose is the presentation to the court of an application for admission to the bar. Such application must be accompanied by the certificate of the examiners, and such other moving papers as are required to show the court that the applicant is eligible and qualified, including a showing as to his good moral character. On the presentation of such evidences of fitness the court, usually on the motion of some member of the bar of recognized standing, admits the applicant, who thereupon takes the required oath. The foregoing is merely an outline of the practice generally prevailing; each jurisdiction has its own laws and rules on this subject, and these are constantly changing to meet the exigencies of the times. In making application for admission to practice, however, all local requirements must be strictly complied with.<sup>4</sup>

<sup>4</sup> *New York*.—Rule 1 of the general rules of practice provides: "An applicant for admission to practice as an attorney and counselor at law on motion, under the provisions of rule 2 of the rules of the Court of Appeals for the admission of attorneys and counselors at law, must present to the court proof that he has been admitted to practice as an attorney and counselor at law in the highest court of law in another state, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities, that he has been duly admitted to practice in such state or country; that he has actually remained in said state or country, and practiced in such court as attorney and counselor at law for at least three years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practiced as an attorney and counselor at law for a period of at least three years after he has been admitted,

specifying the name of the place or places in which he had so practiced, and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the state of New York, or of an adjoining state, for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are residents of the judicial district in which he resides, one of whom must be an attorney and counselor at law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person be-

§ 54. Oath of Office. — It is universally required that a license to practice law shall not be granted until the applicant has taken an oath, the terms of which are set forth formally in some of the statutes, and described in others;<sup>5</sup> and occasionally the

for the court on the motion for his admission, and also before the committee on character and fitness for the district in which the application is made. When the applicant resides in an adjoining state, and a motion is made to admit him to practice in this state without actual residence herein, in addition to the foregoing facts the applicant must prove to the satisfaction of the court that he has opened and maintains an office in this state for the transaction of law business therein. In all cases the applicant for admission must file with the clerk of the Appellate Division of the proper department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice."

Rule 3 of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "Candidates for admission to the bar under this rule (*i. e.*, upon examination) may be admitted and licensed upon producing and filing with the court the certificate of the state board of law examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions, and upon producing and filing with the court, in the case of applicants in the first class (*i. e.*, persons who are not graduates of a college or university), evidence that he has served a regular clerkship of one year in this state with an attorney or attorneys in regular prac-

tice, either before or after having passed such examination. The applicant must also produce and file evidence that he is a person of good moral character, which must be shown by the affidavits of two reputable persons of the town or city in which he resides, one of whom must be a practicing attorney of the Supreme Court. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character, and must set forth in detail the facts upon which such knowledge is based; but such affidavits shall not be conclusive, and the court may make further examination and inquiry. If the applicant be a graduate of a college or university, he must have pursued the prescribed course of law study after his graduation, and if he be a person admitted to the bar of another state or country, he must have pursued his prescribed period of law study after having remained as a practicing attorney in such other state or country for the period of three years."

<sup>5</sup> "He is an officer and is required to take an oath of office which has remained without substantial modifications since the time of Lord Holt." *In re Maddox*, 93 Md. 727, 731, 50 Atl. 487, 55 L.R.A. 298.

The right of a licensed attorney to be permitted to qualify upon taking the oaths required by law at the time of his application for admission is as unquestioned as his right to practice

oath to be administered is found in the constitution, to which the statute refers. In rare instances the statute merely adopts for attorneys the oath administered to all public officers, but generally the oath required is one specially devised for attorneys at law. The common provisions that it shall be administered in open court, shall be reduced to writing, subscribed, preserved in the records of the court, indorsed on the certificate of admission, and the like, and the infliction of a large pecuniary penalty for practicing before taking the oath,<sup>6</sup> indicate that the taking of an oath was regarded by the legislators as far more than a mere formality. A typical statutory form of oath is the following: "I do solemnly swear (or affirm) that I will demean myself as an attorney according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or malice, and that I will support the constitution of the state of Alabama and of the United States, so long as I continue a citizen thereof, so help me God."<sup>7</sup>

Where a statute prescribes the terms of the oath to be exacted before a person shall be admitted to practice, no court has the right to require attorneys already licensed after taking the statutory oath to take another oath imposing additional obligations.<sup>8</sup> And where a state constitution establishes one oath for all offices and for every public trust, and the station of attorney or solicitor is judicially determined to be an "office" or "public trust,"<sup>9</sup> it is not competent for the legislature to require any other oath from him, according to a decision in New York.<sup>10</sup> On the other hand, it was declared in California that if there is no provision of the constitution directly restricting the legislature from exercising plenary

after he has so qualified. *Ex parte Quarrier*, 2 W. Va. 569.

<sup>6</sup> For instance, by Alabama Code 1907, § 2980, "he forfeits the sum of two hundred dollars," recoverable in a *qui tam* action.

<sup>7</sup> The text is copied from Alabama Code, 1907, § 2978. See also *infra*, this section, note 15, the Oklahoma oath.

<sup>8</sup> *Champion v. State*, 3 Coldw. (Tenn.) 111.

<sup>9</sup> See conflicting authorities on that point, *supra*, §§ 14, 15.

<sup>10</sup> *Matter of Wood*, Hopk. (N. Y.)

6. Compare *Matter of Attorneys' Oaths*, 20 Johns. (N. Y.) 492.



power in respect of the oath of attorneys, no such restriction arises by implication.<sup>11</sup>

If a licensed attorney—a *fortiori* an applicant for admission to practice—refuses to take the oath required by a valid statute, a court may properly decline to recognize him as the representative of a litigant therein.<sup>12</sup>

An attorney expressly bound by his official oath to behave himself with all due fidelity, to the court as well as the client, violates it when he consciously presses for an unjust judgment; for it is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience.<sup>13</sup> Likewise, an attorney retained by a private prosecutor and representing the official prosecutor *pro hac vice* in a criminal case, is restrained by the oath taken upon his admission to practice, and ought not to press for conviction when he entertains a sincere belief, based on credible evidence, that the defendant is innocent.<sup>14</sup> In a case where a written license to occupy land was made subject to termination on notice, and a notice bearing the signature of the licensor by "its attorneys," naming them, was duly served, the court said that if the attorneys acted without authority in that behalf it would constitute a violation of their oaths as attorneys.<sup>15</sup> One untoward consequence of an attorney's violation of his oath might be the institution of proceedings for his suspension or disbarment, since

<sup>11</sup> *Ex p. Yale*, 24 Cal. 241, 85 Am. Dec. 62.

<sup>12</sup> *Cohen v. Wright*, 22 Cal. 293; *Ex p. Yale*, 24 Cal. 242, 85 Am. Dec. 62.

<sup>13</sup> *Per Gibson, C. J. in Rush v. Cavanaugh*, 2 Pa. St. 187.

<sup>14</sup> *Rush v. Cavanaugh*, 2 Pa. St. 187.

<sup>15</sup> *Dictum in Nolan v. St. Louis, etc., R. Co.*, 19 Okla. 51, 91 Pac. 1128, an action for possession of the property, founded on the notice. Authority to institute the action was not questioned. The oath required of an attorney in Oklahoma, as in many other states, recites that "you shall

do no falsehood or consent that any be done in court, and if you know of any you will give knowledge thereof to the judges of the court or someone of them, that it may be reformed; you shall not wittingly, willingly, or knowingly promote, sue or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client." *Comp. Laws Okla.* 1909, § 255.

the several obligations expressed in the oath are unquestionably "duties," and this is a word frequently used in the sweeping clause of statutes enumerating grounds for suspension or removal.<sup>16</sup>

§ 55. **Duelling Oath.** — Not long after Alexander Hamilton was slain by Aaron Burr, some of the state legislatures took a step toward the suppression of the polite and fashionable practice of duelling<sup>17</sup> by the enactment of statutes requiring every "officer," or specifically every applicant for admission to the bar, to take an oath that he had not been engaged in a duel, or sent or accepted a challenge, and would not thereafter do so.<sup>18</sup> By construction of words and phrases in the Virginia statute it was held not to include applicants for admission to practice law,<sup>19</sup> one of the judges also expressing the opinion that any statute imposing a new oath on public officers, although there be no pecuniary penalty inflicted on those who refuse to take it, must be regarded as a penal statute and therefore given a strict construction.<sup>20</sup> The Alabama statute was pronounced invalid on the ground that a citizen had a constitutional right to aspire to office or pursue any lawful vocation, and could not be deprived of that right without a trial by jury, and, moreover, because the disqualification created by the statute was a punishment beyond the reach of executive clemency.<sup>1</sup> The New York statute was upheld as against the provisions in a constitution subsequently adopted, the court holding that the latter did not impliedly repeal the former.<sup>2</sup>

<sup>16</sup> For example, Oklahoma Comp. Laws, 1909, § 266 provides: "The following are sufficient causes for suspension or revocation: . . . Third, for the wilful violation of any of the duties of an attorney or counselor." See *infra*, § 773 et seq.

<sup>17</sup> "A great moral and growing evil." Per Tucker, J. in Leigh's Case, 1 Munf. (Va.) 468, 480.

<sup>18</sup> Matter of Dorsey, 7 Port. (Ala.) 293, 355; In re Blake, 1 Blackf.

Johns. (N. Y.) 492; Leigh's Case, 1 (Ind.) 483; In re Attorneys, 20 Munf. (Va.) 468, 486.

<sup>19</sup> Leigh's Case, 1 Munf. (Va.) 468.

<sup>20</sup> Per Fleming, J., in Leigh's Case, 1 Munf. (Va.) 468, 486.

<sup>1</sup> Matter of Dorsey, 7 Port. (Ala.) 293 (by a divided court).

<sup>2</sup> Matter of Attorneys, 20 Johns. (N. Y.) 492. *Contra*, Matter of Wood, Hopk. (N. Y.) 6.

§ 56. **Test Oaths.** — During the Civil War, or immediately thereafter, Congress and some of the state legislatures passed acts requiring every attorney or counselor, or applicant for admission to the bar, to take an oath that he had not borne arms against the United States or otherwise supported the organized enemies thereof.<sup>3</sup> Many of these acts were held void as being practically for the punishment of past conduct, and therefore *ex post facto* laws, and also as being in conflict with the general pardon granted by the President.<sup>4</sup> In Tennessee it was held that a statute requiring courts to administer to "all officers" an oath abjuring the ku-klux-klan association was inapplicable to attorneys at law, especially those who had already been regularly licensed to practice, and that it did not authorize a rule of court subjecting them to its provisions.<sup>5</sup>

§ 57. **Enrollment or Registration.** — As a rule the order of the court admitting one to practice as an attorney at law is forthwith entered of record, and is in itself a sufficient registration; but further enrollment may, of course, be imposed by statute, or even by a rule of court. Thus in New York one who has been admitted to practice must file with the clerk of the Court of Appeals an affidavit to the effect that he has been duly admitted to practice, and has taken the oath of office.<sup>6</sup> A motion for enrollment *nunc pro tunc* will not be allowed.<sup>7</sup> Though a

<sup>3</sup> The Act of Congress of January 24, 1865, is quoted in Ex p. Garland, 4 Wall. 335, 18 U. S. (L. ed.) 366; the California Act of 1863 in Cohen v. Wright, 22 Cal. 293, 306; the West Virginia Act of 1863 in Ex p. Faulkner, 1 W. Va. 269, note.

<sup>4</sup> Cummings v. Missouri, 4 Wall. 277, 18 U. S. (L. ed.) 356; Ex p. Garland, 4 Wall. 333, 18 U. S. (L. ed.) 366; Ex p. Law, 35 Ga. 285, 15 Fed. Cas. No. 8,126; Ex p. Quarrier, 2 W. Va. 569.

For cases holding such acts valid in whole or in part see Cohen v. Wright, 22 Cal. 307; Ex p. Yale, 24 Cal. 241,

85 Am. Dec. 62; State v. Garesche, 36 Mo. 256; Ex p. Hunter, 2 W. Va. 122; Ex p. Quarrier, 4 W. Va. 210.

<sup>5</sup> Ingersoll v. Howard, 1 Heisk. (Tenn.) 247.

<sup>6</sup> Judiciary Law, § 468. See also Thompson v. Stiles, 44 Misc. 334, 89 N. Y. S. 876.

<sup>7</sup> In re Fellowes, 3 Ill. 369.

The Court of Appeals has no power, on original motion, to order the filing *nunc pro tunc* of an attorney's oath for the purpose of registration under chapter 165 of the Laws of 1898. "Whether a court of original jurisdiction has the

petitioner passed the legal examination for admission to the bar, and was permitted to take an attorney's oath and to sign the roll of attorneys, his certificate of admission being withheld until proof of his general educational qualifications, he was not "admitted," and his name is properly stricken from the roll on failure to make such proof.<sup>8</sup>

**§ 58. Order Admitting Applicant—Conclusiveness Thereof — Review.** — It has quite generally been held that the order of admission may be revoked or set aside, for good reason, by the court which made it.<sup>9</sup> But in one state it was held that where a license has been granted to practice law, a motion will not lie at the relation of any person to vacate the order, on the ground that the granting of the license had been obtained by fraud and false representations; because, after the license was granted, the proper remedy was by disbarment proceedings.<sup>10</sup> It is well settled that the order of admission is not subject to collateral

power, under the statute, to relieve an attorney from the consequences of his negligence after he may have become liable to criminal prosecution, we do not now determine." *Matter of Caruthers*, 158 N. Y. 131, 52 N. E. 742.

<sup>8</sup> *In re Alexander*, 167 Mich. 495, 133 N. W. 491.

<sup>9</sup> *Killian v. State*, 72 Ark. 137, 78 S. W. 766; *People v. Betts*, 7 Colo. 453, 4 Pac. 42; *In re Burchard*, 27 Hun (N.Y.) 429.

*Order Admitting Attorney Not Conclusive as to His Moral Character.*—In *Lowenthal's Case*, 61 Cal. 122, the court said: "The order of this court admitting [an attorney] to practice is in the nature of a judgment that he possessed the requisite qualifications when the order was made and entered. (*Ex p. Garland*, 4 Wall. (U. S.) 333.) It follows that the judg-

ment, while it continues in force, is an adjudication determinative of the fact that the defendant was of 'good moral character' when he was admitted by this court, and an attack upon his previous character cannot be made the basis of an order for his removal. Nevertheless, this court will be justified, of its own motion, in setting aside the order admitting the defendant to practice, should it appear that the order was obtained by means of fraudulent artifices or concealment." And it seems that in ascertaining whether fraud has been practiced by an applicant for admission, the court will hear evidence to show that the order of admission was secured by fraudulent concealment of facts affecting the moral character of the person admitted.

<sup>10</sup> *Neff v. Kohler Mfg. Co.*, 90 Mo. App. 296.

attack.<sup>11</sup> It seems that no appeal lies from an order admitting an applicant to the bar,<sup>12</sup> though an appeal does lie from an order refusing his admission.<sup>13</sup> The appellate court, however, will not interfere with a proper exercise of the lower court's discretion.<sup>14</sup>

*Admission of Attorneys of Other Jurisdictions.*

§ 59. Admission of Attorneys from Other States. — Residence within the state as an indispensable requisite to admission to general practice has been discussed in another section.<sup>15</sup> The special admission of attorneys of other jurisdictions for the purposes of a particular trial or other matter of legal business has also been considered.<sup>16</sup> The purpose of this section is to consider the permanent admission to the bar of one state of a duly licensed attorney at law of a sister state. Regulations for such admission are in force in every jurisdiction, either by virtue of statute or rule of court. The mere fact of being admitted to the bar is not sufficient to give one the right to pursue his calling in a jurisdiction other than that wherein he was admitted.<sup>17</sup> And a fortiori no right results from a license which

<sup>11</sup> *Fish v. St. Louis County Printing & Publishing Co.*, 102 Mo. App. 6, 74 S. W. 641; *Parow v. Cary*, 1 How. Pr. (N. Y.) 66; *Holshue v. Morgan*, 170 Pa. St. 217, 32 Atl. 623. See also *Crane v. Nelson*, 37 Ill. App. 597; *Ex p. Trippe*, 66 Ind. 531.

<sup>12</sup> *State v. Johnston*, 2 Har. & M. (Md.) 164, wherein the court said: "Upon the whole, the several courts have, from great antiquity, exercised the power of determining who were or were not qualified to be attorneys of their respective courts, and admit or reject them accordingly. The several statutes and acts of assembly confirm this power, and the Act of 1783 gives them a discretionary power to determine the knowledge, abilities, and integrity, as well as the political principles of the person to be ad-

mitted, and to admit accordingly such as they think qualified. No power appears vested in the Superior Court to countervail such admission, because the remedy on the appeal is given to the other side of the question."

<sup>13</sup> *In re Graduates*, 11 Abb. Pr. (N. Y.) 301; *In re Cooper*, 22 N. Y. 67, 20 How. Pr. 1. See also *Ex p. Beggs*, 67 N. Y. 120.

<sup>14</sup> *Ex p. Beggs*, 67 N. Y. 120. See also *In re Splane*, 123 Pa. St. 527, 16 Atl. 481, 23 W. N. C. 154.

<sup>15</sup> See *supra*, § 32.

<sup>16</sup> See *supra*, § 22.

<sup>17</sup> *In re Rodgers*, 194 Pa. St. 161, 46 Atl. 668; *In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55.

*New York.*—Rule 2(1) of the rules of the Court of Appeals for the admission of attorneys and counselors

does not admit the applicant to practice in all courts of his own state.<sup>18</sup> A statute providing for the admission of lawyers from other states "means such lawyers as are entitled to admission under our law;" it does not authorize the admission of applicants merely because they have practiced in other states, if the same persons would be ineligible to examination as original and resident applicants.<sup>19</sup> An applicant, under a rule of court authorizing the admission of attorneys of a stated number of "years' standing" in another state, must be an attorney of the state from which he came at the time of his application, and have been such continuously for the specified period immediately preceding his application.<sup>20</sup> Hence an attorney who has been permanently disbarred in another state is not entitled to be admitted as an attorney of "standing" in that state; nor is he an attorney "of five years' standing" therein, even though he had practiced there for five years preceding the judgment of disbarment, and has been readmitted but without reversal or modification of such judgment, and has not subsequently practiced there for five years.<sup>1</sup> Speaking of an Illinois statute which entitled attorneys licensed in other states to be admitted to the bar in Illinois "without an examination," the Supreme Court of that state said: "This court has refused to recognize that section as valid, and has required

at law provides: "Any person admitted to practice and who has practiced five years as a member of the bar in the highest law court in any other state or territory of the American Union or in the District of Columbia," may, in the discretion of the court, be admitted without examination.

<sup>18</sup> Under rule 2, Court of Appeals rules, (N. Y.) 48 N. E. vii, relating to admission of attorneys, and rule 1, general rules of practice of Supreme Court, the Appellate Division has no power to admit without examination a person admitted to practice in the highest court of original jurisdiction in Pennsylvania, which admission did not entitle him to prac-

tice in the Supreme Court of that state. *In re Backus*, 151 App. Div. 813, 136 N. Y. S. 484.

Under the statute prescribing the standard for admission to practice law, the court has no jurisdiction to license one on proof that he had been admitted to the bar of the circuit court of a sister state and had for two years practiced law in that state. *Vernon County Bar Assoc. v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

<sup>19</sup> *In re Maddox*, 93 Md. 727, 735, 50 Atl. 487, 55 L.R.A. 298.

<sup>20</sup> *In re Crum*, 72 Minn. 401, 75 N. W. 385, 79 N. W. 967.

<sup>1</sup> *In re Crum*, 72 Minn. 401, 75 N. W. 385, 79 N. W. 967.

that the course of study in the other state shall be at least equal to that prescribed by our rules, or that the applicant should have been engaged in active practice under the license for a specified period.”<sup>2</sup> In Kentucky a nonresident attorney in good standing may appear and practice “in a case in which he may be employed.”<sup>3</sup> But he cannot be admitted to general practice, even after becoming a resident of the state, on any other terms than those imposed by law on resident applicants who have never practiced.<sup>4</sup> An Oregon statute provided that practitioners in the highest court of another state or country “may appear as counsel for a party in a particular action, suit, or before a judicial officer of this state, but not otherwise.” Under authority of a rule of the Supreme Court, the courts had been in the habit of admitting those nonresident attorneys on mere certificate of their admission in the foreign jurisdiction, and, in many instances, without proof of good moral character. The practice “has been tolerated by an exuberance of liberality exercised by the bench and bar,” said the Supreme Court. “It is doubtful, indeed, whether the courts ought to exhibit such extraordinary comity, and whether it does not contravene the policy of the state; but it is difficult for lawyers to be illiberal in such matters, and a very questionable practice has grown up in consequence.”<sup>5</sup> The Pennsylvania Supreme Court denied a petition to be admitted to the bar filed by a resident who had practiced for several years in Illinois, no certificate being presented from a presiding judge in the latter state setting forth that the petitioner was of reputable professional standing as a member of the bar of his county.<sup>6</sup> An applicant was admitted to the bar of the Pennsylvania Supreme Court, at Pittsburgh, upon a certificate of his admission to the Court of Appeals of New York, “which, under the comity which exists between the states, and our rule of court, seemed to entitle him to admission to our court.” Subsequently an examination of the certificate showed that it was not that of the Court of

<sup>2</sup> In *re* Day, 181 Ill. 73, 92, 54 N. E. 646, 50 L.R.A. 519.

<sup>3</sup> Ky. Acts 1902, p. 45, chap. 16, § 1.

<sup>4</sup> In *re* Creste, 98 S. W. 282, holding that Ky. Stat. 1903, § 101, which was originally Acts 1891-1893, pp.

258, 259, chap. 100, § 5, has been repealed.

<sup>5</sup> In *re* Leonard, 12 Ore. 93, 6 Pac. 426, per cur.

<sup>6</sup> In *re* Rodgers, 194 Pa. St. 161, 46 Atl. 668.

Appeals, but of the Supreme Court of New York certifying to his admission to the Court of Appeals. Whereupon the court said: "As his admission to the Supreme Court there would not entitle him to admission here, and as one court is not permitted to certify the records and proceedings of another court, especially a higher court, we regard our order made at Pittsburgh admitting the petitioner to practice in this court as having been improvidently made."<sup>7</sup> By construction of the South Dakota statutes an applicant who has a certificate of admission to the bar in another state, whether he has also practiced there or not, must satisfy the court that he has the general education which the statute requires of applicants in general, and that he has pursued the study of law for three years. If he is unable to present the diploma or certificate specified in the statute, as to his educational qualifications, he must be examined in the same manner as an applicant who has not previously been admitted in any court.<sup>8</sup> Although a Wisconsin statute gave to practitioners in other states, and residing in such states, a right to obtain a license in Wisconsin and thereupon enjoy "all the privileges of attorneys at law resident in this state," the court found it "difficult to believe" that the statute "intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states."<sup>9</sup> In states where the courts exclude women from admission to the bar, a statute providing for admission there of members of the bar from other states will not be construed to authorize the admission of women who have been admitted to the bar in these other states.<sup>10</sup> Women are now excluded from the bar only in Arkansas, Georgia, and Virginia.<sup>11</sup>

**§ 60. Attorneys from Foreign Countries.** — The statutes making special provision for the admission of nonresident attorneys do not usually extend, in terms, to those who have been

<sup>7</sup> *Matter of Splane*, 123 Pa. St. 527, 538, 16 Atl. 481.

<sup>8</sup> *Application for Admission to Practice*, 14 S. D. 429, 85 N. W. 992.

<sup>9</sup> *In re Mosness*, 39 Wis. 509, 511, 20 Am. Rep. 55.

<sup>10</sup> *In re Leonard*, 12 Ore. 93, 6 Pac. 426. See also *In re Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 U. S. (L. ed.) 929; *In re Maddox*, 93 Md. 727, 735, 50 Atl. 487, 55 L.R.A. 298.

<sup>11</sup> See *supra*, § 36.



admitted to the bar in foreign countries. In California the statutory provisions include a person qualified in respect of citizenship in the United States, or declaration of intention, who has been admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence.<sup>12</sup> In New York the court, in the exercise of an authorized discretion, denied the application of a naturalized Italian who had practiced law for many years at Palermo. "When the practitioner comes from a foreign state whose system of law is analogous to our own," said the court, "we may fairly assume that after he has resided here long enough to become eligible in other respects to be admitted to our bar, he has an acquaintance with our system of jurisprudence and our laws that will render him a safe counsel to those clients who apply to him. But, as is well known, our system differs greatly from the law which is administered in the country whence this applicant comes. It is quite true that as to all the rules of law which are based upon the broad principles of natural right and equity, there can be no difference between the laws of any two civilized communities; but the knowledge that is requisite to enable one safely to advise his client requires not only a knowledge of those broad principles of law which are common to all systems, but an intimate acquaintance with the peculiar rules which have grown out of the customs of a particular country, and which have been established by the provisions of its statutes. The foundation of the law of Italy is the Civil Code of the Roman empire, altered by the customs and statutes of the various states now composing that kingdom, and again changed by the statutes of the kingdom itself and by the construction of its courts. The jurisprudence of this state, based as it is upon the constitutions of the United States and of this state, interpreted according to the principles of the common law, has in all these respects nothing common to the law of Italy, and one may be a learned counselor in the laws of that country, and still by no means be competent to give intelligent advice to clients whose affairs are to be controlled by the system established in the state of New York. We think, therefore, that it would not be a wise exercise of the dis-

<sup>12</sup> California Code Civ. Pro. § 279.

cretion which the law has vested in us to assume that this gentleman, however learned he may be in the laws of his own country, is fitted to assume the position of attorney, to give advice to clients upon the laws of this state."<sup>13</sup> Other sections have dealt with the general requirements as to citizenship<sup>14</sup> and race.<sup>15</sup>

### *Objections.*

**§ 61. Objections to Admission.**—All persons are interested in the rectitude of attorneys and may properly be permitted to oppose an application for admission by urging the moral disqualification of the applicant.<sup>16</sup> In Missouri the statute in respect to licensing attorneys requires that the application for the license shall be filed in the clerk's office of the court to which application is made, at least fifteen days before the first day of the term. The purpose of this requirement is to give notice to all persons concerned that the application has been made, and to afford them time and opportunity to appear with their witnesses in opposition to the granting of the license.<sup>17</sup> In a West Virginia

<sup>13</sup> *In re Maggio*, 27 App. Div. 129, 51 N. Y. S. 1055, per cur.

*New York*.—Rule 2(2) of the rules of the Court of Appeals for the admission of attorneys and counselors at law provides: "Any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law," may, in the discretion of the court, be admitted without examination.

And rule 2(3) of the said rules provides: "Any American citizen domiciled in a foreign country whose jurisprudence is based on the principles of the English common law, holding a diploma or degree which would entitle him to practice law in the courts of such foreign country if a citizen thereof," may, in the discretion of the court, be admitted without examination.

Under Court of Appeals rule 2, providing for the admission without examination of attorneys who have practiced for five years as members of the bar in another country, to entitle a person to admission, based on his being a member of the bar of England, Ireland, or Scotland, he must have been entitled to practice in the highest court of some part of the kingdom of Great Britain and Ireland. *In re Wray*, 157 App. Div. 905, 142 N. Y. S. 186.

<sup>14</sup> See *supra*, § 31.

<sup>15</sup> See *supra*, § 33.

<sup>16</sup> *Ex p. Walls*, 73 Ind. 95. See also *In re Hovey*, 80 Pac. 234, 1 Cal. App. xviii., mem., 81 Pac. 1019.

<sup>17</sup> *Neff v. Kohler Mfg. Co.*, 90 Mo. App. 296.

case, a bar association filed a written protest—which was entertained, although not verified—specifying grounds of objection against the moral character of the applicant; the latter filed his sworn answer to the charges preferred against him, and evidence was submitted consisting of affidavits and a record of evidence in a chancery cause vouched by the protestants in support of the charges.<sup>18</sup> In Connecticut a rule of court adopted under legislative authority entrusts to the state bar examining committee, composed of judges and resident attorneys, the decision of the question of an applicant's moral character, after report thereon by a bar meeting. The superior court declined to hear evidence in review of an adverse report of the examining committee, but did inquire whether the approval of the bar was withheld after a fair investigation of the facts. In sustaining that action, Judge Baldwin, speaking for the Supreme Court of Errors, made the following observations: "A court is but indifferently adapted to the task of passing upon the qualifications for engaging in legal practice of those who appear before it as strangers, which are personal to themselves and independent of educational attainments. These can be easily determined by a bar, to some at least of whom they will not be strangers. A court could only proceed, in such a matter, on testimony given in public. The bar can act upon their own knowledge, or upon statements made before them in private, and without the formality of an oath. . . . Long before the adoption of the constitution of the state, therefore, it was the settled practice of the courts to admit no attorneys except on the recommendation of the county bar; and of the bar to recommend none of whose good moral character they were not well satisfied. Each candidate made *prima facie* proof of possessing that character by a certificate from his instructor. But such hearsay evidence could be met by hearsay evidence. Character, so far as it can be judged by men, rests on opinion." And the court found nothing in the constitution or in the declaration of rights which evinced an intention to abridge in any respect the long-established powers of court and bar in reference

<sup>18</sup> In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597.

to the admission of attorneys. It was further held that the reference by the bar of the intended application for examination to their standing committee on admission to the bar was obviously proper, since "it called for inquiries of a delicate nature, and it was in the interest of the public that they should be made in private and by a small body of men;" that the applicant was not entitled to be heard at the bar meeting on the question of adopting the report of the committee; that the vote of the bar against approving the application was not defective because no reasons for their action were stated in it or otherwise communicated to the state bar examining committee; that the committee of the bar properly refused to give the applicant the names of those who appeared before them; and, lastly, that the evidence of the applicant's dishonest financial transactions and other reprehensible conduct was sufficient to support the action of the bar in refusing to rank him among those whom they, acting under their oath of office, could recommend to the representatives of the state as "entitled to the confidence of the committee," even if it were assumed that since the wrongful acts were done his course of life had been altogether exemplary, for "this could not wholly efface the stain upon his character."<sup>19</sup>

**§ 62. Sufficiency of Evidence against Applicant.** — The power to deny an application for admission because the evidence of good moral character is unsatisfactory "is one of great delicacy, and should be exercised with extreme caution, and with a scrupulous regard for the character and rights of the applicant," said the New Jersey Supreme Court. On the other hand, con-

<sup>19</sup> In *re O'Brien*, 79 Conn. 46, 63 Atl. 777. Citing *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; *Matter of Beggs*, 67 N. Y. 120.

"I am one of the last men to place an obstacle in the way of the penitent who has reformed. But I wish to know that he has in truth reformed, and, to be sure of it, I claim the right to investigate. A desire to enter the

ranks of the law is no evidence of repentance of one's sins. I do not know a more profitable field for gifted rascals to exercise their talents in than in the practice of it. This makes it all the more important that the courts should be vigilant to keep them out." Per Brown, J., dissenting in *In re Applicants for License*, 143 N. C. 1, 27, 10 Ann. Cas. 187, 55 S. E. 635, 10 L.R.A. (N.S.) 288.

tinued the court, "the standing of the profession must not be disregarded, nor must the court shrink from the performance of a clear duty however embarrassing."<sup>20</sup> The words "good moral character" in the statutes regulating admission to the bar include, of course, all the elements essential to make up such a character; "among these are common honesty and veracity."<sup>1</sup> The attribute of common honesty could not be imputed to one who was a party to a fraudulent conspiracy to extort money, even though it should happen not to be punishable as a criminal offense.<sup>2</sup> A person recently convicted of larceny does not possess a "good moral character" notwithstanding a full and unconditional pardon.<sup>3</sup> Where an act charged against an applicant is of such a nature and rests upon such evidence as would, if the act were committed in the course of practice, warrant the court in calling upon an attorney at law to show cause why his name should not be stricken from the roll,<sup>4</sup> his application should be denied, unless upon oath he purges himself of the imputed delinquency, or by satisfactory proof relieves himself from the charge.<sup>5</sup> This was the course taken where an indictment against the applicant in the same court had not been traversed, but was quashed upon the ground that the matter charged did not constitute an indictable offense, and the groundwork of the indictment consisted of alleged acts involving fraud and moral turpitude.<sup>6</sup> There are many vices that render a person's character more or less bad that have no tendency to show that he is unsafe and unfit to be intrusted with the powers of the profession, but a want of credibility upon oath does not come within this class.<sup>7</sup> If an applicant's reputation for truth and veracity is proved to be so notoriously bad that he could not be believed under oath, it is unquestionable, said the Michigan Supreme Court, that a

<sup>20</sup> In re Attorney's License, 21 N. J. L. 345.

<sup>1</sup> In re O——, 73 Wis. 602, 618, 42 N. W. 221, a proceeding for disbarment.

<sup>2</sup> People v. Macauley, 230 Ill. 208, 213, 82 N. E. 612, 120 Am. St. Rep. 287.

<sup>3</sup> People v. George, 186 Ill. 122, 133, 57 N. E. 804.

<sup>4</sup> See *infra*, § 773 et seq.

<sup>5</sup> In re Attorney's License, 21 N. J. L. 345.

<sup>6</sup> In re Attorney's License, 21 N. J. L. 345.

<sup>7</sup> Per Grover, J., in In re Percy, 36 N. Y. 651, 654.

license to practice law would be denied him.<sup>8</sup> An applicant's moral character is not necessarily impaired by his failure to disclose the fact that disbarment proceedings are pending against him in another state, or that the order admitting him to the bar in that state had been revoked on grounds not affecting his character; for example, on the ground that he was an alien, he having supposed, however, and for good reasons, that he was a citizen.<sup>9</sup> Nor would a lack of frankness and candor in relation to such a matter, in his answers to questions put to him by a grievance committee opposing his application, necessarily reflect upon his moral character.<sup>10</sup> But if the matter suppressed had been a conviction of gross misconduct or an actual disbarment the case would be otherwise.<sup>11</sup> In a case where an attorney was disbarred because in applying for a license he had presented a letter of recommendation to which he had forged the name of a firm of attorneys, it was said that "had the matter been brought to the attention of the court at the time the application was made, the license would have been denied upon the ground of total unfitness of the applicant."<sup>12</sup> A license was refused where the court was convinced beyond reasonable doubt that the applicant had committed perjury as a witness in another court, and that, being a member of a city council, he was induced, for a pecuniary consideration, to go away and desert his office so that his seat could be declared vacant and another person installed in his place. But in conclusion the court said: "Justice, however, may always be tempered with mercy; and after a reasonable lapse of time, and a satisfactory showing that the applicant has repented of his wrong, and is living the exemplary life and maintaining the good char-

<sup>8</sup> *Matter of Mills*, 1 Mich. 392, 398, where Whipple, C. J. said: "He would [be] told that a person whose reputation for truth and veracity was so bad . . . was an unsafe depository of a power to act as a public attorney; that such a power could only be entrusted by courts to those who sustained 'a good moral character.'"

<sup>9</sup> *In re Hovey*, 1 Cal. App. xviii mem., 81 Pac. 1019.

<sup>10</sup> *In re Hovey*, 1 Cal. App. xviii mem., 81 Pac. 1019, where the court said: "In view of the adverse relations of the parties, we do not deem it material."

<sup>11</sup> *Per Smith, J. in In re Hovey*, 1 Cal. App. xviii mem., 81 Pac. 1019; *Lowenthal's Case*, 61 Cal. 122.

<sup>12</sup> *In re Woodward*, 27 Mont. 355, 71 Pac. 161.

acter which numerous affidavits filed show he bore prior to the offenses charged against him, he will be entitled to the favorable consideration of this court, and this decision shall in no way conclude us upon a subsequent application.”<sup>13</sup>

<sup>13</sup> In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597.

## CHAPTER III

### TAXATION OF ATTORNEYS—UNAUTHORIZED PRACTICE.

#### *Taxation of Attorneys.*

- § 63. Power to Impose Tax.
- 64. Validity of Statutes Imposing Tax.
- 65. Municipal Taxation.
- 66. Taxation of Nonresidents.
- 67. Collection of Taxes.
- 68. Failure to Pay Tax as Affecting Compensation.

#### *Unauthorized Practice.*

- 69. Practicing Without License.
- 70. Status of Proceedings by Unlicensed Person.
- 71. Certain Officers Prohibited from Practicing as Attorneys at Law.

#### *Taxation of Attorneys.*

§ 63. Power to Impose Tax. — In the absence of any constitutional inhibition, it is well settled that the imposition of an occupation tax or license fee upon attorneys at law is entirely within the power of the legislature, and statutes providing for such taxation are in effect in several states.<sup>1</sup> There is nothing

<sup>1</sup> *Alabama*.—In re Dorsey, 7 Port. 293; Jones v. Page, 44 Ala. 657; Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Goldthwaite v. Montgomery, 50 Ala. 486.

*Florida*.—Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93. See also Blanchard v. State, 30 Fla. 223, 11 So. 785, 18 L.R.A. 409.

*Georgia*.—See White v. Hixon, 132 Ga. 567, 84 S. E. 648.

*Louisiana*.—State v. Waples, 12 La. Ann. 343; State v. Fellowes, 12 La. Ann. 344; State v. King, 21 La. Ann. 201.

*Maryland*.—Egan v. Charles County Ct. 3 Har. & M. 169.

*Mississippi*.—Stewart v. Potts, 49 Miss. 749.

*Missouri*.—Simmons v. State, 12 Mo. 288, 49 Am. Dec. 131; St. Louis v. Laughlin, 49 Mo. 559; St. Louis v. Sternberg, 69 Mo. 289, reversing 4 Mo. App. 453.

*Ohio*.—State v. Gazlay, 5 Ohio 22.

*Oregon*.—Lent v. Portland, 42 Ore. 488, 71 Pac. 645.

*South Carolina*.—State v. Hayne, 4 S. C. 403.

*Texas*.—Languille v. State, 4 Tex.



particularly sacred in the profession of a lawyer, which puts him above the legislative power to place on his shoulders his just share of the necessary burdens of the state.<sup>3</sup> The levy of such an occupation tax is wholly a domestic affair, governed by the state constitution and state laws;<sup>4</sup> it cannot be sustained as a police regulation.<sup>5</sup> It has been held, under a statute which provides that all lawyers practicing their profession must pay a license tax, that each member of a firm of practicing lawyers must pay the tax.<sup>6</sup> A retired lawyer who tries a single case for a neighbor gratuitously is not a practicing lawyer, so as to be liable to a statutory penalty for practicing without having paid the privilege license tax.<sup>6</sup>

**§ 64. Validity of Statutes Imposing Tax.**— It has been held that statutes imposing a license fee or tax on members of the legal profession are not obnoxious to the constitutional requirement that taxes shall be uniform, because it demands of every lawyer the same amount of tax without reference to the income, emoluments, or profits of his practice;<sup>7</sup> the rule in this respect

App. 312; *Ex. p. Williams*, 31 Tex. Crim. 282, 20 S. W. 580, 21 L.R.A. 783, followed in *Trezvant v. State*, 20 S. W. 582.

*Virginia*.—*Ould v. Richmond*, 23 Gratt. 464, 14 Am. Rep. 139.

<sup>2</sup> *Cousins v. State*, 50 Ala. 113, 20 Am. Rep. 290; *McCaskell v. State*, 53 Ala. 510; *State v. King*, 21 La. Ann. 201; *State v. Fernandez*, 49 La. Ann. 764, 21 So. 501.

An exemption of attorneys from such a tax must clearly appear. Mere implication is insufficient to establish the relinquishment by the state of the power to tax and regulate the occupations of its citizens. *Goldthwaite v. Montgomery*, 50 Ala. 486.

<sup>3</sup> *Goldthwaite v. Montgomery*, 50 Ala. 486.

<sup>4</sup> *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.

<sup>5</sup> *Jones v. Page*, 44 Ala. 657; *Blanchard v. State*, 30 Fla. 223, 11 So. 785, 18 L.R.A. 409.

<sup>6</sup> *McCargo v. State*, (Miss.) 1 So. 161.

<sup>7</sup> *St. Louis v. Sternberg*, 69 Mo. 289, reversing 4 Mo. App. 453.

A statute imposing a tax upon attorneys does not conflict with the constitutional provision that "all property subject to taxation" in the state "shall be taxed in proportion to its value." *Simmons v. State*, 12 Mo. 268, 49 Am. Dec. 131. See also *State v. Hayne*, 4 S. C. 403.

The argument was advanced in *McCaskell v. State*, 53 Ala. 510, that the right secured to a lawyer by his professional license was a franchise, that a franchise was property, and that the taxation of it as property must be according to the value, which was

being that taxation will be equal and uniform if all persons in the same calling, trade, or profession are taxed alike.<sup>8</sup> Nor is such a statute open to the objection that it is a poll or capitation tax which cannot be levied under the constitution. "The tax is not levied upon the person without relation to his abilities to pay, but it is designed to operate upon the profits of lucrative professions."<sup>9</sup> Nor does a license tax deprive an attorney of any vested right.<sup>10</sup> The professional license of an attorney confers no exemption from an occupation tax.<sup>11</sup> A clear distinction exists be-

to be determined by the income derived from it; and, accordingly, that the occupation tax was illegal. The court said: "It would be difficult to assess a value upon it as property. And to tax each owner of a franchise which is exactly the same in quality and extent to each, according to the profit they respectively realize therefrom, is to tax, not the so-called property according to its value, but the studious labor, industry, and talent by which one person makes it more productive than another."

<sup>8</sup> Ex. p. Williams, 31 Tex. Crim. 262, 20 S. W. 580, 21 L.R.A. 783.

<sup>9</sup> State v. Gazlay, 5 Ohio 22.

<sup>10</sup> Elliott v. Louisville, 101 Ky. 262, 40 S. W. 690; State v. King, 21 La. Ann. 201; Ould v. Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

A lawyer's license, said the Court of Appeals of Virginia, "is a vested civil right; yet it is as properly a legitimate subject of taxation as property, to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable because he has a vested right to it, as for saying that a lawyer's license is not taxable because he has a vested right to it." Ould v. Richmond, *supra*, approved in Young v.

Thomas, 17 Fla. 169, 35 Am. Rep. 93.

<sup>11</sup> Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Goldthwaite v. Montgomery, 50 Ala. 486; McCaskell v. State, 53 Ala. 510; Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93; State v. King, 21 La. Ann. 201; State v. Fernandez, 49 La. Ann. 764, 21 So. 591; Lent v. Portland, 42 Ore. 488, 71 Pac. 645; Languille v. State, 4 Tex. App. 312; Petersburg v. Cocke, 94 Va. 247, 26 S. E. 576, 36 L.R.A. 432.

"Lawyers have no more privileges than other citizens in the pursuit of their profession," said the court in State v. Fernandez, 49 La. Ann. 764, 21 So. 591. "The license to practice, granted to them under the law to pursue the profession of attorney, is only an evidence of character, fitness and ability. The privilege of pursuing the profession carries with it no exemption from the duties of citizenship, the sharing with others the expense of government, both state and municipal. If there is one thing more than any other which should impress itself upon the profession, it is the duty to aid and assist in the execution of the laws, and to bear the just proportion of expenses to make the government a vigorous and healthy instrumentality in the preservation of society and

tween the license by which a person is authorized to practice law as an attorney and the license under a revenue law by which a person is required to contribute a certain sum of money to the public treasury. In the former case the license is a certificate that the person to whom it is given, having been examined in respect to his qualifications, is found worthy, and therefore is authorized to practice his profession. The license tax on the other hand is a measure resorted to for the purpose of producing revenue for public use. The professional license, then, is not an exemption from the burdens of taxation. It merely permits the holder of it to pursue the business and occupation of an attorney at law, and leaves the occupation itself free to be taxed, to the same extent that other occupations may be taxed, and for like purposes.<sup>12</sup> It has been contended that when a lawyer receives his professional license authorizing him to practice in the courts, a contract is created between him and the state, which is impaired by imposing a license tax. It is well settled, however, that a license to practice law is not a contract investing the person to whom it is granted with rights which cannot be interfered with by the state. It is the naked grant of a privilege, which may be revoked, or made subject to such conditions as may be demanded by the public interest.<sup>13</sup> In Tennessee, however, a statute requiring attorneys to pay a license tax has been condemned by the court upon the ground

th· protection of all citizens in all their rights and in the pursuit of their occupations."

<sup>12</sup> *McCaskell v. State*, 53 Ala. 510; *Lent v. Portland*, 42 Ore. 488, 71 Pac. 645.

<sup>13</sup> *Baker v. Lexington*, 53 S. W. 16, 21 Ky. L. Rep. 809; *State v. Waples*, 12 La. Ann. 343; *Simmons v. State*, 12 Mo. 268, 49 Am. Dec. 131; *State v. Gazlay*, 5 Ohio 22; *Languille v. State*, 4 Tex. App. 312; *Ex p. Williams*, 31 Tex. Crim. 262, 20 S. W. 580, 21 L.R.A. 783.

In *Simmons v. State*, 12 Mo. 271, 49 Am. Dec. 131, it was said: "None of the essential elements of a contract

are to be found in the grant of license to practice law; there is no engagement between the state and the applicant for license that he will follow the practice of the law for a livelihood; no legal consideration is paid the state for the license. The grant of the license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option, avail himself of. Therefore the state may revoke the privilege granted, or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest."

"Although the effect of the license

that it constitutes an invasion of the judicial department of the government.<sup>14</sup>

gives to the members of these professions something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits; consequently the license cannot be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand." *State v. Gazlay*, 5 Ohio 15.

<sup>14</sup> In *re Lawyers' Tax Cases*, 8 Heisk. (Tenn.) 565, wherein it was held that an attorney who had been admitted and licensed to practice law was invested with a right which could not be made conditional upon his procuring a license and paying a tax. The court cited *Ex p. Garland*, 4 Wall. 378, 18 U. S. (L. ed.) 370, as establishing the proposition that lawyers admitted to practice in the courts by the orders of the judge become thereby officers of the courts, and necessary constituent parts thereof; and that the right thus acquired cannot be revoked at the mere pleasure of the court, or at the command of the legislature. This being the legal status of attorneys, the court concluded that an invasion of the judicial department of the government would result from the imposition of the tax, saying: "If the legislature has the power to convert the office of an attorney into a taxable privilege, by prohibiting its exercise without taking out an annual license, why may they not by the same process convert the offices

of the clerks, sheriffs, and marshals, and, in fact, of the judges themselves, into taxable privileges, and require them all to pay taxes on their offices, or cease to hold and exercise their functions? In principle no distinction can be drawn. . . . The three departments of the state government being distinct and independent in their respective spheres, the constitution forbids the invasion of the province of one by the exercise of their respective powers in violation of the powers of the others. Such we hold to be the character of the act of the legislature, which undertakes to impose taxes on the privileges or rights of lawyers, who are officers of the courts, and therefore we declare the act unconstitutional and void."

*Compare Ex p. Williams*, 31 Tex. Crim. 262, 20 S. W. 580, 21 L.R.A. 783, wherein it was claimed that there was an implied exemption from the tax, arising from the fact that, as officers of the court, attorneys were a part of the judicial system of the state, and, if the right to tax be conceded, the legislature could tax them out of existence. The court said: "The contention that the legislature may cripple or destroy the judicial department is more plausible than sound. We certainly are not to presume that a co-ordinate department of the government would abuse its power by imposing a prohibitory tax on the practice of law. The objection goes to the existence of the power, rather than to any probability of its exercise. It is, indeed, an objection that could be urged against

§ 65. **Municipal Taxation.** — In the absence of constitutional restraint or limitation, the legislature may delegate to municipal corporations the power to license or tax occupations, trades, employments, and professions, including the legal profession.<sup>15</sup> Thus it has been held that power to impose a license tax on lawyers is derived from a delegation of authority "to license, tax, and regulate for the purpose of city revenue all such business, callings, trades, and employment as the common council may require to be licensed and as are not prohibited by the laws of the state."<sup>16</sup> The imposition of an occupation tax by the state does not preclude a municipality within its borders from levying another such tax.<sup>17</sup> Nor does the omission of the state to tax lawyers affect the

any exercise of the taxing power. Thus, the legislature ought not to have the power to tax land, for fear it might confiscate; nor personal property, because the tax imposed might exceed its value; nor any occupation, business, or pursuit, because they could be taxed out of existence, and the livelihood of many be destroyed. The answer to all such objections is to be found in 'the law and order instincts' of the people, and their capacity for 'self-government.' In the language of Chief Justice Marshall: 'The only security against abuse lies in the structure of our government, and the influence of the constituency over the representatives.' He says the people of a state give their government a right to tax themselves and their property, and prescribe no limit, as the exigencies of the government cannot be measured or limited, resting confidently on the interest of the legislator, and on the influence of the constituency over the representative. *M'Culloch v. Maryland*, 4 Wheat. 428, 4 U. S. (L. ed.) 579."

<sup>15</sup> *Alabama*.—*Ex p. Montgomery*, 64 Ala. 463.

*California*.—*Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.

*Georgia*.—See *Savannah v. Hines*, 53 Ga. 616.

*Kansas*.—*Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

*Kentucky*.—*Baker v. Lexington*, 53 S. W. 16, 21 Ky. L. Rep. 809; *Yantis v. Lexington*, 94 S. W. 653, 29 Ky. L. Rep. 689.

*Louisiana*.—*State v. Fernandez*, 49 La. Ann. 764, 21 So. 591.

*Missouri*.—*St. Louis v. Laughlin*, 49 Mo. 550; *St. Louis v. Sternberg*, 69 Mo. 289, reversing 4 Mo. App. 453.

*North Carolina*.—*Holland v. Isler*, 77 N. C. 1; *Wilmington v. Macks*, 86 N. C. 88, 41 Am. Rep. 443.

*Oregon*.—*Lent v. Portland*, 42 Ore. 488, 71 Pac. 645; *Abraham v. Roseburg*, 55 Ore. 359, Ann. Cas. 1912A 597, 105 Pac. 401.

*Virginia*.—*Ould v. Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948.

<sup>16</sup> *Lent v. Portland*, 42 Ore. 488, 71 Pac. 645.

<sup>17</sup> *Savannah v. Hines*, 53 Ga. 616.

power of a municipality to impose such a tax.<sup>18</sup> The municipal power of taxation does not, of course, exist unless it has been conferred upon the municipality by the state,<sup>19</sup> and such a delegation of authority must be without ambiguity.<sup>20</sup> Thus a grant of authority to tax persons engaged in enumerated trades and occupations and "all other business, trades, avocations or professions whatever," has been held not to empower a municipality to tax lawyers.<sup>1</sup>

**§ 66. Taxation of Nonresidents.** — Where the laws of a state permit attorneys at law to practice their profession therein, although they reside in another state, as, for instance, in New York,<sup>2</sup> it would seem that lawyers so situated would be obliged to pay a tax imposed on the members of their profession by the state in which they practice; and, possibly, by the state of their residence, if they were also members of its bar, and a tax was also

<sup>18</sup> *Ex p. Montgomery*, 64 Ala. 463; *St. Louis v. Sternberg*, 69 Mo. 289, reversing 4 Mo. App. 453.

<sup>19</sup> *Sonora v. Curtin*, 137 Cal. 583, 76 Pac. 674; *St. Louis v. Laughlin*, 49 Mo. 559. See also *Ogden City v. Boreman*, 20 Utah 98, 57 Pac. 843.

<sup>20</sup> *St. Louis v. Laughlin*, 49 Mo. 559; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

<sup>1</sup> *St. Louis v. Laughlin*, 49 Mo. 559, wherein Mr. Justice Wagner said: "In the present case the charter specifically enumerates the classes of persons intended to be taxed, and the sweeping words 'all other business, trades, avocations or professions,' we do not think can be made to include persons not of the same generic character or class. In specifying and enumerating the trades and professions to be taxed, it was intended to limit the taxation to them or to persons engaged in similar trades or oc-

cupations. If it had been designed to tax lawyers, which, as the agreed case finds, number over three hundred in this city, it is unaccountable that they should have been omitted in the enumeration, whilst other professions comprehending but a few persons are expressly referred to and selected. To give the words 'all other business, trades, avocations or professions' the meaning contended for would give the city the power of taxation by license over nearly every laborer. I am of the opinion that the legislature had no such intention in view."

<sup>2</sup> "A person regularly admitted to practice as an attorney and counselor in the courts of record of the state, whose office for the transaction of law business is within the state, may practice as such attorney or counselor although he resides in an adjoining state." Sec. 470, N. Y. Judiciary Law.

imposed therein.<sup>3</sup> So an attorney having his office and place of business in a city, and practicing his profession therein, although he may reside outside of the city's limits, is as much liable to a tax imposed by the city upon attorneys at law, as an attorney residing within the city.<sup>4</sup> But under a grant of authority to a municipality to levy and collect license taxes on attorneys at law "residing in such city," the city has no power to require a license tax from an attorney residing outside the city, although he may maintain his office in the city and transact his business therein.<sup>5</sup> It is doubtful if mere incidental practice would subject a non-resident to taxation. It has been held that a municipal ordinance is not invalid because of a proviso that no license shall be required of such persons as are temporarily in the city on specific professional business.<sup>6</sup>

**§ 67. Collection of Taxes.** — The power to tax occupations includes the power to license them, and to compel the payment of the tax as a condition precedent to entering upon such occupation, or exercising such privilege.<sup>7</sup> So the power to impose fine and imprisonment for a failure to pay the license tax is an incident to the power to levy the tax.<sup>8</sup> And where authorized by statute,

<sup>3</sup> Thus a lawyer, a citizen of Tennessee during the year 1906, and who about six months of the year practiced law in that state and during the remainder of the year maintained a law office in Georgia, was held to be liable in Georgia for a tax imposed for the year 1906 on every practitioner in that state. *White v. Hixon*, 132 Ga. 567, 64 S. E. 648.

<sup>4</sup> *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. 576, 36 L.R.A. 432.

<sup>5</sup> *Garden City v. Abbott*, 34 Kan. 283, 8 Pac. 473.

<sup>6</sup> *Evers v. Mayfield*, 120 Ky. 73, 85 S. W. 697.

<sup>7</sup> *Ex p. Montgomery*, 64 Ala. 463. *Compare* *Ft. Worth, etc., R. Co. v. Carlock*, 33 Tex. Civ. App. 202, 75 S. W. 931, wherein it was held that

the payment of the license fee was not a condition precedent to practicing as an attorney.

*The burden of proof* in a proceeding to collect the tax is on the municipality. *Ahlrichs v. Cullman*, 130 Ala. 439, 30 So. 415.

<sup>8</sup> *Ex p. Montgomery*, 64 Ala. 463; *Yantis v. Lexington*, 94 S. W. 653, 29 Ky. L. Rep. 689; *St. Louis v. Sternberg*, 69 Mo. 289, *reversing*. 4 Mo. App. 453; *Languille v. State*, 4 Tex. App. 312; *Blanchard v. Bristol*, 100 Va. 469, 41 S. E. 948.

It was contended in *McCaskell v. State*, 53 Ala. 510, that, admitting the tax to be lawful, yet it was a violation of the constitution to penalize nonpayment with fine and imprisonment; that the tax when un-

a municipality may proceed by injunction to restrain an attorney from practicing his profession until the license tax is paid.<sup>9</sup>

**§ 68. Failure to Pay Tax as Affecting Compensation. —**

In addition to the incurring of the liability, civil or penal, or both, provided for in the statute by which the tax is imposed, it seems that an attorney who fails to pay his occupation tax would not be able to recover compensation for professional services rendered during the period when such taxes were due and unpaid; this would be especially true if the statute made the payment of the tax a condition precedent to the right to practice his professional calling, in which case, it seems, his failure to pay the tax would operate as if he had never been admitted to the bar,<sup>10</sup> or would render his contract for compensation void. A similar rule prevails as to the failure to pay the tax imposed on the followers of other licensed occupations.<sup>11</sup> And the failure of one member of a firm of lawyers to pay his tax invalidates a contract made with the firm.<sup>12</sup> But the failure of a lawyer to pay an occupation tax will not bar his right to recover on a cause of action assigned to him by his client as compensation for his services.<sup>13</sup>

*Unauthorized Practice.*

**§ 69. Practicing without License. —** In almost all jurisdictions unlicensed persons are prohibited from practicing law.<sup>14</sup> In

paid was merely a debt, and the constitution prohibited imprisonment for debt. The court held that though a tax in a general sense might be a debt, yet it was not so within the meaning of the constitution.

*Reasonableness.*—A fine of fifteen dollars for failure to secure the license and pay a tax of ten dollars is reasonable as to amount. But an imposition of a penalty of fifty dollars per day is unreasonable, it seems. *Baker v. Lexington*, 53 S. W. 16, 21 Ky. L. Rep. 809.

<sup>9</sup> *State v. Fernandez*, 49 La. Ann. 764, 21 So. 591.

<sup>10</sup> See *supra*, § 23. See also *Hittson v. Browne*, 3 Colo. 304; *Tedrick v. Hiner*, 61 Ill. 189; *East St. Louis v. Freels*, 17 Ill. App. 339; *Sellers v. Phillips*, 37 Ill. App. 74; *Hall v. Bishop*, 3 Daly (N. Y.) 109.

<sup>11</sup> 21 Am. & Eng. Enc. of Law (2d ed.) 823, 824; 25 Cyc. 633.

<sup>12</sup> *McIver v. Clarke*, 69 Miss. 408, 16 So. 581.

<sup>13</sup> *Ft. Worth, etc., R. Co. v. Carlock*, 33 Tex. Civ. App. 202, 75 S. W. 931.

<sup>14</sup> *Hittson v. Browne*, 3 Colo. 304; *Fallon v. State*, 8 Ga. App. 476, 69 S. E. 592; *Robb v. Smith*, 4 Ill. 46;



some instances punishments are provided for such practice; thus that the offender becomes liable as for a contempt,<sup>15</sup> or a misdemeanor.<sup>16</sup> So, also, an unlicensed person cannot recover for services rendered by him while assuming to act as an attorney at law.<sup>17</sup> It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts.<sup>18</sup> According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management

In *re Spicer*, Tuck. (N. Y.) 80; *Kaplan v. Berman*, 37 Misc. 502, 75 N. Y. S. 1002. And see *supra*, §§ 21-27.

<sup>15</sup> In *Colorado* it is a criminal contempt of court for any person, except a nonresident attorney admitted for a special occasion, to advertise, represent or hold himself out in any manner as an attorney, attorney at law, or counselor at law, or who shall appear in any court of record in this state to conduct a suit, action, proceeding, or cause for another person." Colo. Laws 1905, chap. 77, p. 157. For technical violation of that section, one who had been admitted to the bar in several other states, and had removed to Colorado, but had not been admitted to general practice there, was convicted in *People v. Ellis*, 44 Colo. 176, 96 Pac. 783. See also *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349.

<sup>16</sup> *People v. Schreiber*, 250 Ill. 345, 95 N. E. 189.

*New York*.—"Practicing or appearing as attorney without being admitted and registered.— . . . Any person violating the provisions of this section is guilty of a misdemeanor and it shall be the duty of the district attorneys to enforce the provisions of this section and to prosecute

all violations thereof." N. Y. Penal Law, § 270.

"None but attorneys to practice in New York city.—A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court or before any magistrate in the city of New York, or make it a business to practice as an attorney in a court or before a magistrate in said city, unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record of the state." N. Y. Penal Law, § 271.

"Penalty for violation of last section.—A person who violates the last section is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail, not exceeding one month, or by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars, or by both such fine and imprisonment. But this and the last section do not apply to a case where a person appears in a cause to which he is a party." N. Y. Penal Law, § 272.

<sup>17</sup> See *supra*, § 23.

<sup>18</sup> Per *Woods, J.* in *In re Duncan*, 83 S. C. 186, 189, 18 Ann. Cas. 657, 65 S. E. 210, 24 L.R.A.(N.S.) 750; *Com. v. Barton*, 20 Pa. Super. Ct. 447.

of such actions and proceedings in behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds,<sup>19</sup> and in general all advice to clients and all actions taken for them in matters connected with the law.<sup>20</sup> In Canada it was held that a person does "directly or indirectly practice" law, within the meaning of those words in a statute, when, and not gratuitously, he prepares papers and documents of a legal character, to be used in courts.<sup>1</sup> In an Indiana case the court intimated that a county auditor forbidden by statute to "practice as an attorney before the board of county commissioners" disobeyed the statute by writing and preparing a contract and bond for a party in connection with his business before the board, and making a charge for the service.<sup>2</sup> In the same case the court said: "As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court."<sup>3</sup> A person who, as a solicitor, issued a writ, made a motion in court in a single case, on behalf of the plaintiff in the record, and, the motion being denied, carried an appeal in the plaintiff's name, was "practicing" as a solicitor.<sup>4</sup> But a person does not "practice" in "courts" as a solicitor unless he takes, on behalf of a client, some of the regular steps of procedure in an action or some other judicial proceeding.<sup>5</sup> In England it

<sup>19</sup> In re Co-operative Law Co., 198 N. Y. 479, 19 Ann. Cas. 879, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A.(N.S.) 55.

<sup>20</sup> In re Duncan, 83 S. C. 186, 18 Ann. Cas. 657, 65 S. E. 210, 24 L.R.A. (N.S.) 750.

<sup>1</sup> Per Draper, C. J. in Allen v. Jarvis, 32 U. C. Q. B. 56, 64.

<sup>2</sup> Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, the court saying that "the preparation of the contract and bond

are but steps in a legal proceeding depending before the board."

<sup>3</sup> Per Lotz, J. in Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836.

<sup>4</sup> In re Clarke, 32 Ont. 237, *distinguishing* In re Horton, 8 Q. B. D. (Eng.) 434.

<sup>5</sup> Per Strong, J. in Macdougall v. Upper Canada Law Soc., 18 Can. Sup. Ct. 203, 212, 11 Can. L. T. 30, *reversing* 15 Ont. App. 150, which *affirmed* 13 Ont. 204.

was held that an unlicensed person who virtually carried on the business of solicitor in the name of a licensed solicitor, though with the consent of the latter, violated a statute forbidding him to "act as an attorney or solicitor," or take proceedings "in the name of any other person."<sup>6</sup> By a single transaction of taxing a bill of costs, a person did not "act or practice" as an attorney within the meaning of a statute, as construed by its context.<sup>7</sup> An unlicensed person who, as "agent" for a defendant, gave formal written notice of appearance for the latter, violated a statute making it a contempt of court for such a person to "carry on" a "proceeding."<sup>8</sup> A party holds himself out to the world as an attorney in a cause if it is prosecuted, with his consent, by a firm of attorneys of which he is a member, although by the terms of the partnership he has no interest in the particular case.<sup>9</sup> In Massachusetts "whoever, not having been admitted to practice as an attorney at law in accordance with the provisions" regulating admission, "represents himself to be an attorney or counselor at law, or to be lawfully qualified to practice in the courts of this commonwealth, by means of a sign, business card, letterhead or otherwise, shall" be punished, etc.<sup>10</sup> By the artful omission of a comma in his letterhead, a collector of claims did not save himself from conviction under that statute.<sup>11</sup> An unlicensed person who causes his name, followed by the word "attorney," to be printed in a city directory and on business cards and letterheads, with nothing therein to suggest that he is not an attorney at law, violates a statute forbidding an unlicensed person to "hold himself out in any manner as an attorney."<sup>12</sup> In Pennsylvania a person

<sup>6</sup> *Abercrombie v. Jordan*, 8 Q. B. D. (Eng.) 187.

*A fortiori* where the person whose name was used as a solicitor was not licensed to act as such, or if licensed did not consent to the use of his name. In *re Simmons*, 15 Q. B. D. (Eng.) 348.

<sup>7</sup> In *re Horton*, 8 Q. B. D. (Eng.) 434.

<sup>8</sup> In *re Ainsworth*, [1905] 2 K. B. (Eng.) 348.

<sup>9</sup> *Edmonson v. Davis*, 4 Esp. (Eng.) 14, distinguished and criticised per Strong, J. in *Macdougall v. Upper Canada Law Soc.* 18 Can. Sup. Ct. 203, 216, reversing 15 Ont. App. 150, which affirmed 13 Ont. 204.

<sup>10</sup> Mass. Rev. Laws 1902, chap. 165, § 45, p. 1483.

<sup>11</sup> *Com. v. Grant*, 201 Mass. 458, 87 N. E. 895.

<sup>12</sup> *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349.

may not unlawfully "hold himself out to the public as being entitled to practice law before the courts of the county" in which he resides, even if he be a member of the bar in another county.<sup>13</sup> It seems that a person by appearing on behalf of a defendant, examining and cross-examining witnesses, and arguing the case, would not violate a penal statute forbidding him "to practice law as an attorney in any of the courts," if he did not claim or receive any compensation for his services, professed to act as "agent," and did not hold himself out to the public as an attorney at law.<sup>14</sup> So a retired lawyer who conducted one suit in court for a neighbor, without fee or reward, did not thereby become indictable for practicing law without paying a privilege tax; for the term "practicing" in the statute implies something more than a single act or effort.<sup>15</sup> Exercise of the duties or powers of a notary public is not associated with what is commonly understood as the practice of the law.<sup>16</sup> Where a real estate agent happens to be a licensed attorney, and all he does as an attorney is a mere incident to his real estate agency, he is not exempt from jury duty under a statute exempting "practicing attorneys."<sup>17</sup> A chartered accountant having a legal right to collect debts and consequently to ask payment of them, sent a dunning letter to a debtor, with a threat of suit. He did not thereby "practice as an advocate," nor "usurp the functions of the profession" of law, within the prohibition of a statute, although his letter contained an illegal charge for writing it.<sup>18</sup> A person who carried on the

<sup>13</sup> *Com. v. Branthoover*, 24 Pa. Co. Ct. 353, where a jury convicted him, it seems, on his letterheads.

<sup>14</sup> *State v. Bryan*, 98 N. C. 644, 4 S. E. 522.

<sup>15</sup> *McCargo v. State*, (Miss.) 1 So. 161, the court saying that this was "no more a violation of law than it would be for a retired dentist to extract gratuitously a tooth for another without first obtaining a privilege tax license as practicing dentists are required to do."

<sup>16</sup> *Per Draper, C. J. in Allen v. Jarvis*, 32 U. C. Q. B. 56, 64.

<sup>17</sup> *Wheatley v. State*, 11 Lea (Tenn.) 262.

<sup>18</sup> *Montreal Bar v. Duff*, 24 Quebec Super. Ct. 478, wherein St. Pierre, J. said: "What the legislature had in view was to protect the legal profession against the acts of those who would attempt to pass themselves off as lawyers, and through this deception exact fees which they had no right to demand. The practice of lawyers to write warning or conciliatory letters to the adverse party has been so common and so universal that it may be considered as part of

business of a process server and prepared the usual affidavit relating to service for the use of a solicitor, by whom he was employed, did not thereby "act as a solicitor," but only for a solicitor and in the capacity of a witness.<sup>19</sup> Nor did a person "act as a solicitor" by serving as an intermediate channel of communication between a licensed solicitor and the probate office—"simply executed instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them," receiving a small payment from the solicitor for the services.<sup>20</sup> A person does not "practice as an attorney" by performing services for a party which might have been rendered as well by any good business man, and discussing questions of fact which might have been done as well by a layman as by a lawyer.<sup>1</sup> And for this reason it seems that an unlicensed person may render services in aid of an application for a pardon,<sup>2</sup> or for the reduction of a claim for taxes.<sup>3</sup> So, also, where a license is not required in order to practice, as in courts not of record, these statutes would not be applicable.<sup>4</sup>

**§ 70. Status of Proceedings by Unlicensed Person.**—The clerk of a court should not put on his docket the name of counsel not authorized to practice in that court.<sup>5</sup> As a general rule the court will not consider a brief filed by one who is not a

the exercise of their profession, but I know of no law by which such practice might be restricted to members of the legal profession or which would constitute it a privileged right in their favor."

But see *contra* as to similar letters and threats by a mercantile agency, *Montreal Bar v. Sprague's Mercantile Agency*, 25 Quebec Super. Ct. 383. Compare *In re C*—, 5 British Columbia 530.

<sup>19</sup> *In re Louis*, [1891] 1 Q. B. (Eng.) 649, 64 L. T. N. S. 565, 60 L. J. Q. B. 500, 39 W. R. 511.

<sup>20</sup> *Law Soc. of United Kingdom v. Waterlow*, 8 App. Cas. (Eng.) 407, 52 L. J. Q. B. 674, 49 L. T. N. S. 141, 31 W. R. 754, where Lord Bramwell said: "What is done by Messrs. Waterlow [defendants] is not to act as proctors but to do something for a proctor."

<sup>1</sup> *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441.

<sup>2</sup> *Bird v. Breedlove*, 24 Ga. 623.

<sup>3</sup> *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441, 23 Ky. L. Rep. 1481.

<sup>4</sup> See *supra*, § 27.

<sup>5</sup> *Thorn v. Lawson*, 6 Tex. 240.

licensed attorney,<sup>6</sup> and such briefs may be stricken from the files.<sup>7</sup> An action instituted and prosecuted by a person who is not an attorney of the court, but an "agent" or "attorney in fact" of the plaintiff, may properly be dismissed, if no statute authorizes him to do such acts.<sup>8</sup> And if he attempts to prosecute a writ of error to review the judgment of dismissal, in a court where he is not licensed to practice, the writ will be dismissed.<sup>9</sup> Under the New York code<sup>10</sup> it has been held that a judgment obtained in favor of a litigant who was represented by an unlicensed person will be reversed,<sup>11</sup> the theory being that, under the code, the unlicensed person, and the judge who permitted him to represent a party in court, were both guilty of a misdemeanor, and, therefore, such illegality in the proceeding necessarily affected the validity of the judgment. It is doubtful, however, whether the New York cases would be approved in any other jurisdiction. It would seem to be much more in accordance with law and reason, not that the judgment should be declared void, but that the offenders should suffer the punishment imposed by law.<sup>12</sup> And it has also been held in New York that a regularly licensed attorney, who sent an unlicensed person to represent him in the Municipal Court, could not afterwards complain that such representative was forbidden to practice.<sup>13</sup> In a Pennsylvania case, where a præcipe

<sup>6</sup> *Duyster v. Crawford*, 69 N. J. L. 229, 54 Atl. 823; *Leaver v. Kilmer*, 71 N. J. L. 291, 59 Atl. 643.

In *Fallon v. State*, 8 Ga. App. 476, 69 S. E. 592, briefs on behalf of the state in a criminal case were filed in the Court of Appeals by attorneys, one of them the acting solicitor general, who were members of the bar of the Supreme Court, but not of the Court of Appeals. The court said the briefs could not be received as briefs of counsel, and could be considered only for purposes of information; and "for informal appearances of this character" the court declined to tax the usual fee as costs in the case.

<sup>7</sup> *Ellis v. Bingham County*, 7 Idaho 86, 60 Pac. 79.

<sup>8</sup> *Harkins v. Murphy*, 51 Tex. Civ. App. 568, 112 S. W. 136. See also *Robb v. Smith*, 4 Ill. 46; *McKoan v. Devries*, 3 Barb. (N. Y.) 196. But compare *Rader v. Snyder*, 3 W. Va. 413.

<sup>9</sup> *Harkins v. Murphy*, 51 Tex. Civ. App. 568, 112 S. W. 136.

<sup>10</sup> §§ 63, 64 Code Civ. Pro.

<sup>11</sup> *Kaplan v. Berman*, 37 Misc. 502, 75 N. Y. S. 1002; *Newburger v. Campbell*, 58 How. Pr. (N. Y.) 313, 9 Daly 102. See also *Roy v. Harley*, 1 Duer. (N. Y.) 637.

<sup>12</sup> See *Rader v. Snyder*, 3 W. Va. 413.

<sup>13</sup> *Kerr v. Walter*, 104 App. Div. 45, 93 N. Y. S. 311.

for a fi. fa. was issued by an attorney not admitted to practice in the county, and the prothonotary, who could have refused to recognize it, accepted it and issued the writ in due form, it was held that subsequent lienholders had no standing to set it aside, and the court doubted whether the defendant himself could be heard to complain.<sup>14</sup>

**§ 71. Certain Officers Prohibited from Practicing as Attorneys at Law.**— While a suitor has an undoubted right to be heard by his counsel whenever he presents such as are not legally disqualified, this right is not at all inconsistent with the right of the legislature to say who may be attorneys, and in what cases they may or may not appear, providing, of course, that such legislation is otherwise unobjectionable.<sup>15</sup> Thus the legislative body may properly say that a justice of the peace shall not appear as attorney for any person in the county for which he may be appointed;<sup>16</sup> that no clerk of any court of record shall act as attorney in the court of which he is clerk;<sup>17</sup> that a judge shall not practice<sup>18</sup> nor shall his clerk or law partner practice before him.<sup>19</sup> Nor shall a person holding the office of a

<sup>14</sup> *Hooven Mercantile Co. v. Morgan*, 15 Pa. Co. Ct. 567, 4 Pa. Dist. Ct. 48.

<sup>15</sup> *West Feliciana R. Co. v. Johnson*, 5 How. (Miss.) 273, wherein it was said that the constitution, in securing to all persons the right to be heard in court, by themselves or counsel, does not mean that no limitations can be imposed by law upon the admissibility of attorneys. If so, none of the various regulations adopted from time to time, as to the mode of admitting attorneys to the bar, and their expulsion for improper or criminal behavior, could be sustained. As officers of the courts in which they practice, they are subject to be silenced, and totally disqualified from appearing as attorneys, for improper conduct.

<sup>16</sup> *West Feliciana R. Co. v. Johnson*, 5 How. (Miss.) 273.

<sup>17</sup> *West Feliciana R. Co. v. Johnson*, 5 How. (Miss.) 273; *Ex p. Collins*, 2 Va. Cas. 222.

N. Y. Code Civ. Pro. § 61, prohibits the clerk of a court from practicing as an attorney during his term of office. In *Cronin v. O'Reiley*, 7 N. Y. S. 337, it was held that where a member of a firm of attorneys is appointed clerk, the remaining member may proceed in a cause without an order of substitution.

<sup>18</sup> *Lilly v. State*, 7 Okla. Crim. 284, 123 Pac. 575.

<sup>19</sup> "The law partner or clerk of a judge shall not practice before him as attorney or counselor in any cause, or be employed in any cause which originated before him. A law partner of, or person connected

bank director appear as attorney for the bank.<sup>20</sup> So referees in bankruptcy are forbidden to practice as attorneys and counselors at law in any bankruptcy proceeding.<sup>1</sup> In the absence of statutory inhibition, however, there could be no objection to such officers practicing as attorneys, at least in courts other than those to which they are accredited.<sup>2</sup> The partners of prosecuting attorneys are sometimes prohibited from defending criminal cases<sup>3</sup> though one holding such an office may have a partner in civil business.<sup>4</sup>

in law business with, a judge shall not practice or act as an attorney or counselor in a court of which the judge is or is entitled to act as a member, or in a cause originating in that court, except where the latter is a member of a court ex officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein." Sec. 471 of the N. Y. Judiciary Law.

<sup>20</sup> *West Feliciana R. Co. v. Johnson*, 5 How. (Miss.) 273.

<sup>1</sup> § 39b (2) of the Bankruptcy Act (1 Fed. Stat. Annot. p. 650—Supp. 1912, p. 666).

<sup>2</sup> Thus in a Michigan case it was held that one of the justices of the peace of Grand Rapids may act as attorney, in a circuit court, in a cause appealed from the other justice; the said justices having separate courts and records, and there being no statute forbidding them so to act. *Grady v. Sullivan*, 112 Mich. 458, 70 N. W. 1040, 4 Detroit Leg. N. 52.

<sup>3</sup> The statute of Missouri (sec. 1039, R. S. 1909) forbidding partners of prosecuting attorneys from defending in criminal cases, does not apply to United States district attorneys practicing in the federal court. *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844.

*New York*.—"An attorney who directly or indirectly advises in re-

lation to, or aids or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by a person as district attorney or other public prosecutor, with whom such attorney is directly or indirectly connected as a partner; or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court, as district attorney or other public prosecutor, afterwards directly or indirectly advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise; or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a misdemeanor, and on conviction thereof, shall be punished accordingly, and must be removed from office by the Supreme Court." N. Y. Penal Law, § 278.

*Attorneys may defend themselves*.—"The last section does not prohibit an attorney from defending himself in person, as attorney or as counsel, when prosecuted either civilly or criminally." N. Y. Penal Law, § 279.

<sup>4</sup> *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844.



## CHAPTER IV.

### PRIVILEGES, EXEMPTIONS, DISABILITIES—LIBEL AND SLANDER.

#### *Privileges and Exemptions in General.*

- § 72. Generally.
- 73. Privilege from Arrest.
- 74. Privilege from Service of Process.

#### *As to Language Used by Attorney in Judicial Proceedings.*

- 75. Rule Where Language Is Pertinent.
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#### *Privileges and Exemptions in General.*

§ 72. **Generally.** — At common law an attorney was entitled to certain privileges by virtue of his office. These were allowed for the benefit of suitors and in the interest of the due administration of justice, and not for the benefit of the attorney.<sup>1</sup> In

<sup>1</sup>Greenleaf v. Peoples Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L.R.A. 499. See also Varian v. Ogilvie, 3 Johns. (N. Y.) 450; Moulton v. Hubbard, 6 Johns. (N. Y.) 332; Walsh v. Sack-Attys. at L. Vol. I.—8.

addition to the privileges and exemptions considered in the succeeding sections, attorneys were held to be exempt from filling certain minor offices, such as sheriff,<sup>2</sup> overseers of the poor, supervisors of public roads and highways, and constable.<sup>3</sup> Attorneys were also exempt from jury service, and are so now in some jurisdictions.<sup>4</sup> The exemption did not, however, extend to military service.<sup>5</sup> Attorneys were also privileged, under the common law, with respect to the courts wherein they might sue and be sued as litigants. This privilege, however, while in force in the early days in some of the states,<sup>6</sup> is now obsolete. Attorneys are now sued, and generally may sue, without regard to their occupation.<sup>7</sup> All of these privileges ceased when the attorney ceased to practice his professional calling,<sup>8</sup> or, of course, when abrogated

rider, 7 Johns. (N. Y.) 537; Willett v. Starr, 8 Johns. (N. Y.) 123; In re Bailey, 1 Johns. Cas. (N. Y.) 32; Wood v. Gibson, 1 Cow. (N. Y.) 597.

*Right to Attend Court.*—When a court room is so crowded that more people cannot be admitted without producing disorder and confusion, neither a member of the bar nor any other person has a right to enter, unless for purposes immediately connected with the business then before the court or demanding its immediate attention. If he insists on entering, against the objection of the officer at the door, the latter may use sufficient force to eject him. In re Attorneys, 30 Pittsb. Leg. J. N. S. (Pa.) 362.

*Leave of Absence.*—Where counsel has leave of absence, this dispenses with the discharge of any and every professional duty imposed upon him by the business of the court at that term. Hamilton v. Conyers, 25 Ga. 158.

But leave of absence of counsel does not extend to any other cases than those in which he appears to be

of counsel on the dockets of the court. White v. Haslett, 49 Ga. 280.

<sup>2</sup> Mayor v. Berry, 1 W. Bl. (Eng.) 636, 4 Burr. 2109.

In Stone's Case, 1 Lev. (Eng.) 265, it was held that an attorney copyholder was privileged from being reeve by custom.

<sup>3</sup> Republica v. Fisher, 1 Yeates (Pa.) 350.

<sup>4</sup> In re Swett, 20 Pick. (Mass.) 1.

<sup>5</sup> Gerard's Case, 2 W. Bl. (Eng.) 1123; Matter of Bliss, 9 Johns. (N. Y.) 347; Republica v. Fisher, 1 Yeates (Pa.) 350. *Compare* Evingdon's Case, 2 Stra. (Eng.) 1130.

<sup>6</sup> See *infra*, § 74. See also Walford v. Fleetwood, 14 M. & W. (Eng.) 449; Rastrick v. Beckwith, 2 Dowl. & L. (Eng.) 624; Hern v. Howard, 1 W. Bl. (Eng.) 231; Brooks v. Patterson, 2 Johns. Cas. (N. Y.) 102; Scott v. Van Alstyne, 9 Johns. (N. Y.) 216; Colt v. Gregory, 3 Cow. (N. Y.) 22; Cole v. McClellan, 4 Hill (N. Y.) 59.

<sup>7</sup> See *infra*, § 74.

<sup>8</sup> Mayor v. Berry, 1 W. Bl. (Eng.)

by statute.<sup>9</sup> The privilege as to confidential communications passing between attorney and client has been considered in another place.<sup>10</sup>

**§ 73. Privilege from Arrest.** — At common law an attorney was privileged from arrest on civil process,<sup>11</sup> especially while attending court, and on his way to and returning from court.<sup>12</sup> It seems that such privilege was not allowed in criminal cases, because it could not be claimed as against the king.<sup>13</sup> Nor did it extend to an attorney going to attend a court in which he was not admitted to practice,<sup>14</sup> or to an attorney who was about to leave the country,<sup>15</sup> or to one who represented a surety only.<sup>16</sup>

636; *Brooks v. Patterson*, Col. & C. Cas. (N. Y.) 133.

<sup>9</sup> *Matter of Bliss*, 9 Johns. (N. Y.) 347.

<sup>10</sup> See *infra*, § 92 et seq.

<sup>11</sup> *England*.—*Atty.-Gen. v. Leather Sellers' Co.*, 7 Beav. 157; *In re Sheriff of Kent*, 2 C. & K. 197, 61 E. C. L. 197; *Jones v. Marshall*, 2 C. B. N. S. 615, 89 E. C. L. 615, 3 Jur. N. S. 916; *Phillips v. Pound*, 7 Exch. 881, 16 Jur. 645. See also *Williams v. Webb*, 2 Dowl. N. S. 904, 5 Scott N. R. 898.

*New Jersey*.—*Ogden v. Hughes*, 5 N. J. L. 718.

*New York*.—*Brooks v. Patterson*, 2 Johns. Cas. 102, Col. & C. Cas. 133; *Emmet's Case*, 2 Cai. 387; *Scott v. Van Alstyne*, 9 Johns. 216; *Webb v. Cleveland*, 9 Johns. 266; *Gibbs v. Loomis*, 10 Johns. 463; *Tiffany v. Driggs*, 13 Johns. 252; *Secor v. Bell*, 18 Johns. 52; *Colt v. Gregory*, 3 Cow. 22; *Gay v. Rogers*, 3 Cow. 368; *Willard v. Sperry*, 1 Wend. 32; *Corey v. Russell*, 4 Wend. 204; *Humphrey v. Cumming*, 5 Wend. 90; *Bohanan v. Peterson*, 9 Wend. 503; *Colt v. McClellan*, 4 Hill 59.

*Virginia*.—*Com. v. Ronald*, 4 Call. 97.

<sup>12</sup> *Webb v. Taylor*, 1 Dowl. & L. (Eng.) 676, 8 Jur. 39; *In re Hope*, 9 Jur. (Eng.) 856; *In re Hippisley*, cited in *Meekins v. Smith*, 1 H. Bl. (Eng.) 636.

<sup>13</sup> *Kirkham v. Whaley*, 1 Ld. Raym. (Eng.) 27. See also *Payne's Case*, 1 Leon. 81, 74 Eng. Rep. (Reprint) 743.

<sup>14</sup> *Price v. Clutterbuck*, 1 F. & F. (Eng.) 379.

<sup>15</sup> *Thompson v. Moore*, 1 Dowl. N. S. (Eng.) 283, 5 Jur. 1009; *Flight v. Cooke*, 8 Jur. (Eng.) 125, 1 Dowl. & L. 174, 13 L. J. Q. B. 78.

<sup>16</sup> *Jones v. Marshall*, 2 C. B. N. S. 615, 89 E. C. L. 615, 26 L. J. C. Pl. 229, wherein it was held that an attorney who attended on the occasion when his client became bail for a defendant in an action in the lord mayor's court, and who acted there only as the attorney and adviser of such bail, and not as the attorney and adviser for either of the parties to the cause, was not privileged from arrest in going to or returning from the court on such occasions.

So, also, on the theory that an attorney was presumed to be always in attendance at court, it was held that he could not be arrested on civil process at any time.<sup>17</sup> This is of little importance now, however, that imprisonment for debt has been generally abolished. But it is just as essential now as it ever was, that attorneys should not be arrested, at least without the permission of the court, while actually engaged in court in the trial or argument of a cause. To this extent only the privilege has been approved in this country;<sup>18</sup> to carry it any further would not only be unnecessary, but actually detrimental to lawyers as having a tendency to separate them from the general public.<sup>19</sup> Even though entitled to the privilege, an attorney may waive it either expressly, or impliedly by failing to assert it.<sup>20</sup>

**§ 74. Privilege from Service of Process.** — In several jurisdictions it has been held that an attorney is privileged from the service of process while in attendance at court in his professional capacity;<sup>1</sup> and this privilege has been extended to the going to

<sup>17</sup> 3 Bl. Com. 289.

<sup>18</sup> *Robbins v. Lincoln*, 27 Fed. 342 (denied under an Illinois statute); *Central Trust Co. v. Milwaukee St. R. Co.*, 74 Fed. 442; *Elam v. Lewis*, 19 Ga. 608; *Corey v. Russell*, 4 Wend. (N. Y.) 204; *Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L.R.A. 499; *Respublica v. Fisher*, 1 Yeates (Pa.) 350.

*Michigan*.—"No attorney, solicitor, or counselor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court." *Hoffman v. Bay Cir. Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L.R.A. 663, quoting from 2 How. Stat. § 7253.

*New York*.—An officer of a court of record, appointed or elected pursuant

to law, is privileged from arrest, during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or counselor is not thus privileged, unless he is employed in a cause, to be heard at that term. § 565 N. Y. Code Civ. Pro., and § 24 N. Y. Civil Rights Law.

<sup>19</sup> *Elam v. Lewis*, 19 Ga. 608.

<sup>20</sup> *Cole v. McClellan*, 4 Hill (N. Y.) 59.

<sup>1</sup> *Central Trust Co. v. Milwaukee St. R. Co.*, 74 Fed. 442; *Mitchell v. Huron Cir. Judge*, 53 Mich. 541, 19 N. W. 176; *Cofrode v. Wayne Cir. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511; *Hoffman v. Bay Cir. Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L.R.A. 663; *Matthews v. T. fts*, 87 N. Y. 568; *Whitman v. Sheets*, 11 Ohio Cir. Dec.

and returning from an appellate court.<sup>2</sup> Such immunity is deemed necessary to the due administration of justice.<sup>3</sup> It has also been held that this privilege is not affected by the fact that a statute provides for exemption from arrest, and fails to provide for exemption from service of process, during attendance at court;<sup>4</sup> but in New York, where a statute of this kind is in force, it was held, although the practice was censured, that an attorney might be lawfully served with civil process notwithstanding his presence in court for a professional purpose;<sup>5</sup> and a like decision was rendered by a federal court in construing an Illinois statute.<sup>6</sup>

179, 20 Ohio Cir. Ct. 1; *Young v. Armstrong*, 13 W. N. C. (Pa.) 313; *Williams v. Hatcher*, 95 S. C. 49, 78 S. E. 615.

<sup>2</sup> *Hoffman v. Bay Cir. Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L.R.A. 663, 4 Detroit Leg. N. 165.

<sup>3</sup> *Central Trust Co. v. Milwaukee St. R. Co.*, 74 Fed. 442; *Hoffman v. Bay Cir. Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L.R.A. 663; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Matthews v. Tufts*, 87 N. Y. 568.

<sup>4</sup> *Hoffman v. Bay Cir. Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L.R.A. 663, 4 Detroit Leg. N. 165.

<sup>5</sup> In *National Press Intelligence Co. v. Brooke*, 18 Misc. 373, 41 N. Y. S. 658, it was held that by virtue of statute service of an order of supplementary proceedings on an attorney while in court in his capacity as attorney for the purpose of arguing a pending motion was valid. The court said: "At common law and prior to the Revised Statutes, an attorney was exempted from arrest or being sued during the actual sitting of the court

of which he was an officer, if he was employed in some cause pending and then to be heard in such court, *sundo, morando, redeundo* (which means going, remaining and returning). *Gilbert v. Vanderpool*, 15 Johns. 242; *Van Alstyne v. Dearborn*, 2 Wend. 586. But the Revised Statutes, part III, chapter 3, title 2, section 86, changed the law so as to restrict the privilege so that they were 'exempt from arrest during the sitting of the court of which he is an officer,' if he was 'employed in some cause pending and then to be heard in such court.' While I cannot too strongly condemn the propriety of serving papers on an attorney in open court, I think such service is legal. The reason of exemption prior to the Revised Statutes was 'not to take away an attorney while in court in discharge of his duty by a *ca. sa.*, by which a suit was then instituted.' Under the present procedure, a service of summons or order would not interfere with such a discharge of his duties. The reason for the exemption having ceased to exist, the maxim *cessante ratione, cessat lex* applies."

<sup>6</sup> *Robbins v. Lincoln*, 27 Fed. 342.

The privilege of exemption from service of process while in attendance at court is denied in North Carolina.<sup>7</sup>

*As to Language Used by Attorney in Judicial Proceedings.*

**§ 75. Rule Where Language Is Pertinent.** — In the United States the rule is well settled that attorneys conducting judicial proceedings are privileged from prosecution for libel or slander in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the question involved. Within this limit the protection is complete, irrespective of the motive with which the words or writings are used. But the privilege does not extend to matter having no materiality or pertinency to the question involved in the suit.<sup>8</sup> In approving this rule, Parkhill, J.,

<sup>7</sup> *Greenleaf v. Peoples' Bank*, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L.R.A. 499, wherein the court said: "In a very few states of the Union the courts have held that attorneys at law, while in attendance upon court, are exempted from the service of summons or other process not in arrest; but the reasoning upon which those decisions are based is not satisfactory to us. It must be borne in mind that the privilege of exemption from arrest afforded to attorneys while attending court is not so much for the benefit of the lawyers as it is for their client, and for the aid they give to the court as officers thereof in the due administration of justice."

<sup>8</sup> *Alabama*.—*Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49.

*California*.—*Hollis v. Meux*, 69 Cal. 628, 11 Pac. 248, 58 Am. Rep. 574; *Carpenter v. Ashley*, 148 Cal. 422, 7 Ann. Cas. 601, 83 Pac. 444; *Gosewisch v. Doran*, 161 Cal. 511, 119 Pac. 656.

*Florida*.—*Myers v. Hodges*, 53 Fla. 197, 44 So. 357.

*Georgia*.—*Lester v. Thurmond*, 51 Ga. 118; *Conley v. Key*, 98 Ga. 115, 25 S. E. 914; *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 719, 51 S. E. 756, 3 L.R.A. (N.S.) 1139.

*Illinois*.—See *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317; *Burdette v. Argile*, 94 Ill. App. 171.

*Kentucky*.—*Morgan v. Booth*, 13 Bush 481; *Stewart v. Hall*, 83 Ky. 375.

*Louisiana*.—*Lescale v. Joseph Schwartz Co.*, 118 La. 718, 43 So. 385. See also reading matter at end of this note.

*Maryland*.—*Maulsby v. Reifsnider*, 69 Md. 154, 14 Atl. 505.

*Massachusetts*.—*Hoar v. Wood*, 3 Met. 193; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *McLaughlin v. Cowley*, 127 Mass. 316, *affirmed* 131 Mass. 70.

*Michigan*.—*Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701.

said: "In coming to this conclusion, we are not unmindful of the weighty reasons advanced in favor of the English doctrine of absolute privilege for defamatory words published in the course of judicial proceedings; that it is to the interest of the public that great freedom should be allowed in complaints and allegations with a view to have them inquired into, and that parties and counsel should be indulged with great latitude in the freedom of speech in the conduct of their causes in courts and in asserting their rights, because in this way the purposes of justice will be subserved, and the court can and will protect the party aggrieved by expunging irrelevant, defamatory matter from the pleadings, and by punishing for contempt of court the guilty party. We think the ends of justice will be effectually accomplished by not extending the privilege so far as to make it an absolute exemption from

*New York.*—*Gilbert v. People*, 1 Den. 41, 43 Am. Dec. 646; *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *Dada v. Piper*, 41 Hun 256, 2 N. Y. St. Rep. 152; *Marsh v. Ellsworth*, 50 N. Y. 309; *Sickles v. Kling*, 60 App. Div. 515, 69 N. Y. S. 944; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265.

*North Carolina.*—*Shelfer v. Gooding*, 47 N. C. 175.

*Pennsylvania.*—*Com. v. Culver*, 1 Pa. L. J. Rep. 363, 2 Pa. L. J. 361. See also *Com. v. Godshalk*, 13 Phila. 575, 34 Leg. Int. 312.

*South Carolina.*—*Vausse v. Lee*, 1 Hill L. 197, 26 Am. Dec. 168.

*Tennessee.*—*Davis v. McNees*, 8 Humph. 40.

*Texas.*—*Kruegel v. Cockrell*, 151 S. W. 352.

*Vermont.*—*Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704.

*Washington.*—*Miller v. Gust*, 71 Wash. 139, 127 Pac. 845.

*Wisconsin.*—*Jennings v. Paine*, 4 Wis. 358.

A somewhat different rule has been laid down in Louisiana as follows: "The best rule is, we think, to protect counsel for everything they say which is pertinent to the cause, if they are instructed by their clients to say it; and to hold them responsible for everything that is impertinent to the case, whether they are instructed or not." *Stackpole v. Hennen*, 6 Mart. N. S. (La.) 481, 17 Am. Dec. 187, wherein the court said: "In France the same limits are assigned, with this sole difference, that there, by positive legislation of a very recent date, the instructions must be in writing. *Martin's Rep. de Jures*, vol. 1, p. 464. . . . In Rome, while a generous freedom was inculcated on counsel in advocating the causes of their clients, the prohibition was express against profiting by this liberty to speak untruths and utter slander. Spain, in her written laws, has repeated nearly verbatim the restraints imposed by the imperial code."

liability for defamatory words wholly and entirely outside of, and having no connection with, the matter of inquiry. For why should a person be absolutely privileged to defame another in the course of a judicial proceeding by making slanderous statements wholly outside of the inquiry before the court? We think it unnecessary to carry the doctrine so far. The ends of justice can be effectually accomplished by placing a limit upon the part of counsel who avails himself of his situation to gratify private malice by uttering slanderous expressions and making libelous statements, which have no relation to, or connection with, the cause in hand or the subject-matter of inquiry. The person whose good name suffers has, or ought to have, the right to vindicate his reputation by an appeal to the courts, instead of taking the law into his own hands. The law would be a vain thing indeed to shut the gates of justice in his face, and at the same time fetter his hands by the command, 'Thou shalt not kill.' The person accused may have suffered great financial loss by the slander published under the protection of the law, and the only compensation or consolation he would have would be the indulgence in the reflection that the court had enriched the public treasury with a fine collected from his defamer."<sup>9</sup> In determining what is pertinent, however, much latitude must be allowed to the judgment and discretion of those who maintain a cause in court. Much allowance should be made for the earnest though mistaken zeal of a litigant who seeks to redress his wrongs, and for the ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own.<sup>10</sup> In applying this principle the courts are liberal, even to the extent of declaring that where matter is put forth by counsel in the course of a judicial proceeding that may possibly be pertinent, they will not deprive its author of his privilege, because the due administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander.<sup>11</sup> The privilege is extended to the counsel for the interest and benefit of the party, and to allow him full scope and freedom in the legitimate support or defense of

<sup>9</sup> *Myers v. Hodges*, 53 Fla. 197, 44 So. 357; *Hoar v. Wood*, 3 Met. So. 357. (Mass.) 197.

<sup>10</sup> *Myers v. Hodges*, 53 Fla. 197, 44

<sup>11</sup> *Youmans v. Smith*, 153 N. Y. 214,



the rights of the party.<sup>12</sup> Where the words are uttered in the course of a trial, it is immaterial whether they are addressed to a witness, or to the court or jury.<sup>13</sup> The rule has been applied not only to regular attorneys engaged in the trial of a cause, but to one conducting his own defense before a magistrate,<sup>14</sup> and to a master acting as counsel in behalf of his slave on trial before a competent tribunal.<sup>15</sup> And it has been said that when, in the absence of the public prosecutor, a complainant is acting as party or counsel in the management of a criminal prosecution before a magistrate, either as a matter of right or by permission of the magistrate, he is entitled to the same privileges as a party or counsel in other judicial proceedings.<sup>16</sup> The rule has also been invoked in regard to statements in various written pleadings and the like, such as a declaration in a justice's court,<sup>17</sup> statements in an answer to a bill of complaint in chancery,<sup>18</sup> objections to a discharge in bankruptcy,<sup>19</sup> specifications of opposition to an insolvent's discharge,<sup>20</sup> an information upon which to base a search warrant,<sup>1</sup> and law briefs of counsel.<sup>2</sup>

**§ 76. Rule Where Language Is Not Pertinent.**— The general rule is that defamatory words, published in the due course of

47 N. E. 265; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330.

In *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265, it was held that where an attorney in a pending judicial proceeding had printed, and submitted to persons expected to be called as witnesses, questions to be asked them, which, although libelous, were not so manifestly immaterial that under no circumstances could they be asked upon the trial, the drafting and printing thereof was privileged and protected the attorney against a prosecution for libel.

<sup>12</sup> *Hoar v. Wood*, 3 Met. (Mass.) 193; *Jennings v. Paine*, 4 Wis. 358.

<sup>13</sup> *Hoar v. Wood*, 3 Met. (Mass.) 193.

<sup>14</sup> *McDavitt v. Boyer*, 169 Ill. 475, 48 N. E. 317; *Morgan v. Booth*, 13 Bush (Ky.) 481; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330.

<sup>15</sup> *Shelfer v. Gooding*, 47 N. C. 175.

<sup>16</sup> *Hoar v. Wood*, 3 Met. (Mass.) 193.

<sup>17</sup> *Gilbert v. People*, 1 Den. (N. Y.) 41, 43 Am. Dec. 646.

<sup>18</sup> *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701.

<sup>19</sup> *Marsh v. Ellsworth*, 50 N. Y. 309.

<sup>20</sup> *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574.

<sup>1</sup> *Vause v. Lee*, 1 Hill L. (S. C.) 197, 26 Am. Dec. 168.

<sup>2</sup> *Stewart v. Hall*, 83 Ky. 375.

a judicial proceeding, and which are not relevant or pertinent to the subject of inquiry, are conditionally or qualifiedly privileged; that is, *prima facie* privileged. Language so used is not actionable unless malice is shown.<sup>3</sup> But where an attorney, or counsel, in such a proceeding, goes out of the way to asperse and vilify another by words or writing not material or pertinent to the controversy, he is without protection, and is liable to be prosecuted as in other cases of slander or libel.<sup>4</sup> Counsel cannot avail himself of his situation to gratify private malice by uttering slanderous expressions, which have no relation to the cause or subject-matter of the inquiry, either against a party, a witness, or a third person.<sup>5</sup> Nor does it follow, because an attorney will be exempt from liability for words spoken in open court in the conduct of his case, that he would be likewise exempt when repeating the words on another occasion when he was under no obligation either to the public or his client to speak in reference to the matter. While no malice would be implied, either from the character of the words or the falsity of the charge, when they were uttered in the course of a judicial proceeding, the repetition of the words, either in private conversation or in a published article in a newspaper at his instance, when no public or private duty required him to repeat them, would place him, as to such repetition, upon the same footing as any one who speaks of another; he speaks then at his peril.<sup>6</sup>

<sup>3</sup> *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49; *Myers v. Hodges*, 53 Fla. 197, 44 So. 357; *Dada v. Piper*, 41 Hun 256, 2 N. Y. St. Rep. 152.

In cases of conditionally privileged publications, the presumption, which attends cases not so privileged, of malice from the publication of libelous language does not prevail; the burden of proof is changed, and in order for the plaintiff to recover he is called upon affirmatively and expressly to show malice in the publisher. This malice may be inferred from the language of the publication itself, or may be proven by extrinsic circumstances; but malice is not inferable from the mere fact that the

statements are untrue, or that the defendant used strong words, or that the expressions are angry and intemperate. *Myers v. Hodges*, 53 Fla. 197, 44 So. 357.

<sup>4</sup> *Gilbert v. People*, 1 Den. (N. Y.) 41, 43 Am. Dec. 646. And see *Lester v. Thurmond*, 51 Ga. 118; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

<sup>5</sup> *Hollis v. Meux*, 69 Cal. 628, 11 Pac. 248, 58 Am. Rep. 574; *Hoar v. Wood*, 3 Met. (Mass.) 198; *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701; *Com. v. Culver*, 1 Pa. L. J. Rep. 363, 2 Pa. L. J. 361.

<sup>6</sup> *Lester v. Thurmond*, 51 Ga. 118; *Atlanta News Pub. Co. v. Medlock*,

**§ 77. Communications between Attorney and Client.** — Communications between an attorney and his client are qualifiedly privileged, so that no malice can be inferred therefrom.<sup>7</sup> The same privilege exists as to communications between an attorney and a prospective client, preliminary to the retainer, where the attorney reasonably believes that his services may be required.<sup>8</sup> If a retainer is genuine, the fact that the attorney is not well disposed toward the person defamed is not proof of malice sufficient to remove the privilege.<sup>9</sup> But where a communication between attorney and client is made, not in good faith, but maliciously, the slanderer or libeler is not protected from liability.<sup>10</sup> Thus counsel cannot, under the pretext of giving advice to a client, openly slander a third person.<sup>11</sup> The general subject of privileged communications is treated later.<sup>12</sup>

**§ 78. Rule in England and in Canada.** — In England the rule appears to be that no action will lie against counsel for slanderous works spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered maliciously and without any justification or even excuse, and from personal ill will towards the person slandered, arising out of a previously existing cause, and are irrelevant to every issue of fact contested before the court.<sup>13</sup> But the subsequent publication of such

123 Ga. 720, 51 S. E. 756, 3 L.R.A. (N.S.) 1139.

<sup>7</sup> *Wright v. Woodgate*, 2 C. M. & R. (Eng.) 573, Tyrw. & G. 12, 1 Gale 329; *Lapetina v. Santangelo*, 124 App. Div. 519, 108 N. Y. S. 975. See also *O'Donaghue v. McGovern*, 23 Wend. (N. Y.) 26.

<sup>8</sup> *Browne v. Dunn*, 6 Rep. (Eng.) 67.

<sup>9</sup> *Browne v. Dunn*, 6 Rep. (Eng.) 67.

<sup>10</sup> *Lapetina v. Santangelo*, 124 App. Div. 519, 108 N. Y. S. 975.

<sup>11</sup> Where an attorney gives advice in a public or semipublic place, in a loud voice, and in hearing of divers persons, and it is addressed, not to

the client, but to a third person, the alleged communication is slanderous. *Kruse v. Rabe*, 80 N. J. L. 378, Ann. Cas. 1912 A 477, 79 Atl. 316, 33 L.R.A. (N.S.) 469.

<sup>12</sup> See *infra*, § 92 et seq.

<sup>13</sup> *Munster v. Lamb*, 11 Q. B. D. (Eng.) 588. See also *Pedley v. Morris*, 61 L. J. Q. B. (Eng.) 21, 65 L. T. N. S. 526; *Brook v. Montague*, Cro. Jac. (Eng.) 90; *Wood v. Gunston*, Style (Eng.) 462; *Hodgson v. Scarlett*, 1 B. & Ald. (Eng.) 232; *Mackay v. Ford*, 5 H. & N. (Eng.) 792. And see *Myers v. Hodges*, 53 Fla. 197, 44 So. 357, and *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, wherein the English rule is discussed.

slandorous matter is not justifiable unless it is published for the purpose of giving the public information which it is fit and proper for them to receive.<sup>14</sup> In Canada it has been held that an advocate is not liable in damages for defamatory statements made concerning a witness under examination where the statements are made without malice and under the instructions of his client.<sup>15</sup>

### *Disabilities.*

§ 79. **Generally.**—In addition to those matters which are considered in the following sections under this subdivision, it is usual to consider, as disabilities, certain matters which the attorney may not do in dealing with his client. Under the plan of this work, however, it is deemed advisable to treat those subjects elsewhere—thus as to the attorney's duty to refrain from representing conflicting interests,<sup>16</sup> or becoming interested in the subject matter of the litigation in which his client is involved.<sup>17</sup> So an attorney is, in most jurisdictions, under a disability to purchase claims for litigation,<sup>18</sup> and in no jurisdiction may he reveal the confidential communications made to him by his client.<sup>19</sup> Matters of this character, while they may properly be classified as disabilities, are either so large, or so inseparably connected with kindred topics, as to require consideration in other portions of the work.

§ 80. **Attorney Becoming Surety.**—In the absence of any statute or rule to the contrary, an attorney may qualify as surety either for his client or for any other person.<sup>20</sup> In most jurisdic-

<sup>14</sup> *Flint v. Pike*, 4 B. & C. 173, 10 E. C. L. 380.

<sup>15</sup> *Gauthier v. St. Pierre*, 28 L. C. Jur. 16.

<sup>16</sup> See *infra*, §§ 174-182.

<sup>17</sup> See *infra*, §§ 164-173.

<sup>18</sup> See *infra*, § 395.

<sup>19</sup> See *infra*, § 92 et seq.

<sup>20</sup> *Husband v. Georgia Southern*, etc., R. Co., 3 Ga. App. 157, 59 S. E. 326; *Abbott v. Zeigler*, 9 Ind. 511; *Wright v. Schmidt*, 47 Ia. 233; *Daly v. Duffy*, 26 La. Ann. 468; *State v.*

*Babin*, 124 La. 1005, 18 Ann. Cas. 837, 50 So. 825; *Murray v. Moynahan*, 27 Wash. 379, 67 Pac. 810.

A statute making it unlawful for any judicial or ministerial officer of any of the courts of the state to go bail for any prisoner, etc., refers exclusively to such officers as judges, clerks, sheriffs, and their deputies, etc., as directly constitute the machinery of the court, and does not prohibit an attorney from becoming a surety on his client's bail bond,

tions, however, it has been declared by statute that attorneys may not become sureties,<sup>1</sup> especially in causes wherein they are interested as counsel.<sup>2</sup> The regulation of matters of this kind is undoubtedly within the power of the legislature,<sup>3</sup> and in the absence

though an attorney is an officer of the courts generally. *State v. Babin*, 124 La. 1005, 18 Ann. Cas. 837, 50 So. 825.

<sup>1</sup> *Massie v. Mann*, 17 Ia. 131; *Cuppy v. Coffman*, 82 Ia. 214, 47 N. W. 1005; *Johnson v. Com.*, 2 Duv. (Ky.) 410; *Towle v. Bradley*, 2 S. D. 472, 50 N. W. 1057; *Dennett v. Reisdorfer*, 15 S. D. 466, 90 N. W. 138; *Branger v. Buttrick*, 30 Wis. 153; *Gilbank v. Stephenson*, 30 Wis. 155.

That a statute prohibiting a practicing attorney from becoming a surety in any suit or proceeding is not limited to attorneys connected with the suit in which the obligation is given, but extends to all attorneys whether interested or not, see *Towle v. Bradley*, 2 S. D. 472, 50 N. W. 1057, followed in *Dennett v. Reisdorfer*, 15 S. D. 466, 90 N. W. 138.

<sup>2</sup> *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731.

In *Tessier v. Crowley*, 17 Neb. 207, 22 N. W. 422, it was said: "The law prohibiting such signing is based upon considerations of sound public policy. An attorney should never allow himself to be placed in the attitude of encouraging litigation. Nor should he allow himself to become personally interested in the cause of his client by assuming any personal liability. When he does become thus interested a strong inducement is offered to seek and take unjust and unfair advantage of the opposite side without reference to the justice of his cause. The law is also for his protection. When interested in behalf of a client

whose cause he believes to be just, he is liable, unless restrained by a due and proper respect for the law, to assume liabilities which may become very embarrassing to him. The law very properly admonishes him to avoid such liabilities."

*Statutes Strictly Construed.*—In *Lewis v. Higgins*, 52 Md. 614, the court held that a rule of court providing that an attorney shall not become security for costs or surety on an appeal bond has no application to attachment bonds. It does not appear in that case whether the relationship of attorney and client existed between the parties.

In *Tennessee*, in *Halfacre v. State*, 112 Tenn. 609, 79 S. W. 132, it was held that a statute providing that an attorney should not sign any bond or enter into any recognizance as surety for the appearance of any defendant or defendants in any criminal case pending against such defendants did not apply where a fine was assessed and an attorney was offered as surety for the fine. It does not appear from the decision whether or not the attorney offered as surety was the attorney for the defendant.

In *Cunningham v. Tucker*, 14 Fla. 251, it was held that a rule of court prohibiting attorneys from signing as sureties for their clients did not prohibit an attorney from signing an injunction bond as principal or in behalf of the parties, and that the rule should receive a strict construction.

<sup>3</sup> *Ohio, etc., R. Co. v. Hardy*, 64

of legislative regulation may be governed by rule of court;<sup>4</sup> although in Louisiana it has been held that an attorney may go surety for his client in either a civil or a criminal case, notwith-

Ind. 454; *Johnson v. Com.*, 2 Duv. (Ky.) 410.

<sup>4</sup> *Morrill v. Lamson*, 138 Mass. 115; *State v. Von Martels*, 10 Ohio Dec. (Reprint) 819, 11 Cinc. L. Bul. 154; *Gardy v. Moffit*, 14 W. N. C. (Pa.) 438.

*New York*.—Rule V. of the general rules of practice provides: "In no case shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case or proceeding."

It has been held that the attorney for a nonresident plaintiff may become security for costs. *Walker v. Holmes*, 22 Wend. 614. And it has been held that a solicitor in chancery may become surety for his client for costs in the proceeding. *Micklethwaite v. Rhodes*, 4 Sandf. Ch. 434. So he may be a surety on an appeal bond. *Studwell v. Palmer*, 5 Paige 57.

In *Ryckman v. Coleman*, 13 Abb. Pr. 398, the court held that the practice of prohibiting attorneys from becoming security for their clients extended only to bail for the appearance of parties arrested, and that an attorney might become security for his client on an undertaking for the continuance of an injunction.

However, other decisions in this jurisdiction seem to deny the right of an attorney to become a surety for his client. Thus, in *Coster v. Watson*, 15 Johns. 535, the court held that

special bail signed by an attorney might be refused by the court. And see *Evans v. Harris*, 47 Super. Ct. 366, from the decision in which case it seems that an attorney would not be competent to become surety for his client in the face of a prohibitory rule of court. And in *Miles v. Clarke*, 4 Bosw. 632, affirming 2 Bosw. 709, the court held that a practicing attorney is disqualified to become bail in a civil action if an exception is taken to his reception as such. But see *Scott v. Craig*, 1 Wend. 36, wherein it is held that if an attorney signs as bail and is accepted, he cannot escape the obligation he has entered into, nor can his acceptance be made the subject of an objection on a motion to quash a writ of error. And in *Lawler v. Van Aernam*, 22 Alb. L. J. 156, it was held that a rule of court prohibiting attorneys from becoming surety on any bond or undertaking did not apply to justices' courts, and that an appeal bond on an appeal from a justice's court, though signed by an attorney, was regular and valid.

In *Canada* it is held to be for the advantage of an attorney to prohibit him from becoming security for costs for his client. *Beckett v. Wragg*, 1 Ch. Chamb. (Ont.) 5; *Re Gibson*, 13 Ont. Pr. 359. In *Lemelin v. Larue*, 10 L. C. Rep. 190, where an attorney put in a bond for his client to procure an appeal in violation of a rule of court, the court declared the proceeding to be irregular, but allowed further time to put in a proper bond.

standing a rule of court to the contrary.<sup>5</sup> The purpose of these prohibitory measures is to protect attorneys from the unreasonable importunities of clients, who, not satisfied with the faithful discharge of professional duty, insist that their attorneys shall become sureties for the result of litigation. To yield to their importunities is to assume pecuniary risks and losses which it is no part of the professional duty of an attorney to assume, and which he therefore ought not to assume. They are risks and losses the assumption of which tends to make an attorney a *quasi* principal in litigation, rather than an officer of the court whose duty it is to act as a minister of justice.<sup>6</sup> In some instances the prohibition as to becoming surety is expressly confined to practicing attorneys,<sup>7</sup> and, of course, would not apply to one who has ceased to

*In England* it seems to be against the settled policy of the law, and the rules of the respective courts, to allow an attorney to become surety for his client. See *Bell v. Gate*, 1 Taunt. 162; *Richie v. Gilbert*, 1 Taunt. 164, note a; *George v. Barnsley*, 1 Chit. 8, 18 E. C. L. 13. But it has been held that if an attorney signs a bond or recognizance for his client in violation of the rule of court, the obligation is not void, and he may be proceeded against thereon. *Harper v. Tahourdin*, 6 M. & S. 383. See also *Rex v. Sheriff*, 1 Chit. 714 note, 18 E. C. L. 213 note.

<sup>5</sup> *Daly v. Duffy*, 26 La. Ann. 468; *State v. Babin*, 124 La. 1005, 18 Ann. Cas. 837, 50 So. 825.

<sup>6</sup> *Schuek v. Hagar*, 24 Minn. 339; *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731.

It is an attorney's duty to devote his ability, skill, and diligence along ethical and professional lines to the interests of his client, and to refrain from entering into any alliance or incurring any obligation connected with the litigation in which he is engaged

as counsel that would place him in a position where his personal interests would be adverse to those of his client. While attorneys as a rule faithfully observe and fearlessly discharge these duties and obligations, regardless of the effect that their actions in these respects may have on their own personal interests, yet experience has demonstrated that there are exceptions to the general rule, and that there are members of the legal profession who, when their own personal interests are involved in an action or proceeding in which they are acting as counsel, are apt to, and sometimes do, disregard these general duties which the law imposes upon them. Therefore, in order to prevent attorneys from having an undue interest in litigation in which they are employed as counsel, they are prohibited in this and many other jurisdictions, either by statute or rule of court, from becoming surety for their clients." *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731.

<sup>7</sup> *Hudson v. Smith*, 111 Ia. 411, 82

be such.<sup>8</sup> Under some statutes an attorney has been held to be incompetent as a surety on an appeal from the judgment of a justice of the peace, or other such minor court;<sup>9</sup> but a rule of the court to which an appeal from such inferior court lies, prohibiting attorneys from becoming sureties, would not apply to the proceedings in the inferior court;<sup>10</sup> although it would seem that on the filing of the appeal the appellate court might then compel the giving of security in conformity with its rules.<sup>11</sup>

**§ 81. Validity and Effect of Bond Given by Attorney in Violation of Statute or Rule of Court.** — The general rule is that a bond signed by an attorney, for his client, or for any other person, is none the less binding because of the existence of a statute, or rule of court, which declares that an attorney is not a proper surety on such a bond. Having entered into the obligation, the attorney will be bound thereby,<sup>12</sup> although he may be subject to

N. W. 943; *Cothren v. Connaughton*, 24 Wis. 134.

<sup>8</sup> *Evans v. Harris*, 47 Super. Ct. (N. Y.) 366.

<sup>9</sup> *Valley Nat. Bank v. Garretson*, 104 Ia. 655, 74 N. W. 11; *Hudson v. Smith*, 111 Ia. 411, 82 N. W. 943. Compare *Stark v. Small*, 72 Wis. 215, 39 N. W. 359, wherein it was held that the memorandum on a justice's docket required to be signed by sureties for costs is not an "undertaking, bond, or recognizance," within the meaning of a statute providing that no attorney shall be taken as bail or security on such instruments in any action or proceeding.

<sup>10</sup> *Lawler v. Van Aernan*, 22 Alb. L. J. (N. Y.) 156; *Gardy v. Moffit*, 14 W. N. C. (Pa.) 438.

<sup>11</sup> See *De Jarnatt v. Marquez*, 127 Cal. 538, 60 Pac. 45, 78 Am. St. Rep. 90.

<sup>12</sup> *Arkansas*.—*State v. Jones*, 29 Ark. 127.

*Georgia*.—*Husband v. Georgia*, etc.,

R. Co., 3 Ga. App. 157, 59 S. E. 326. See also *Burton v. Wynne*, 55 Ga. 615.

*Illinois*.—*Jack v. People*, 19 Ill. 57

*Indiana*.—Ohio, etc., R. Co. v. Hardy, 64 Ind. 454.

*Iowa*.—*Massie v. Mann*, 17 Ia. 131.

*Kansas*.—*Sherman v. State*, 4 Kan. 570; *Potter v. Payne*, 31 Kan. 218, 1 Pac. 617.

*Kentucky*.—*Holandsworth v. Com.*, 11 Bush 617.

*Massachusetts*.—*Morrill v. Lamson*, 138 Mass. 115; *Johnson v. Sprague*, 183 Mass. 102, 66 N. E. 422.

*Missouri*.—*Hicks v. Chouteau*, 12 Mo. 341.

*Nebraska*.—*Tessier v. Crowley*, 17 Neb. 207, 22 N. W. 422; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027; *Chase v. Omaha L. & T. Co.*, 56 Neb. 358, 76 N. W. 896.

*Ohio*.—*Grahame v. Douglas*, Wright 738; *Wallace v. Scoles*, 6 Ohio 428; *Hays v. Rush*, 8 Ohio Dec. (Reprint) 50, 5 Cinc. L. Bul. 328.

*Pennsylvania*.—*Wise v. Pennsyl-*



punishment as for contempt of court.<sup>13</sup> An attorney who becomes surety under such circumstances is estopped to deny the validity of his act.<sup>14</sup> But it has been held that a statute providing that "no practicing attorney or counselor shall be a surety in any suit or proceeding which may be instituted in any of the courts of this territory," deprives an attorney of the legal power or ability to become a surety in an undertaking in any suit or proceeding, whether he be attorney therein or not, and no waiver of objection to an attorney as surety, either by himself or a party to the action in which he executes an undertaking, can make him compe-

vania Hard-Vein Slate Co., 3 Pa. Dist. Ct. 564.

*Texas*.—Kohn v. Washer, 69 Tex. 67, 6 S. W. 551; Rogers v. Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300; Prusiecki v. Ramzinski, 81 S. W. 549.

<sup>13</sup> Love v. Sheffelin, 7 Fla. 40; Ohio, etc. R. Co. v. Hardy, 64 Ind. 454; Wallace v. Scoles, 6 Ohio 428.

<sup>14</sup> Jack v. People, 19 Ill. 57; Sherman v. State, 4 Kan. 493; Holandsworth v. Com. 11 Bush (Ky.) 617; Tessier v. Crowley, 17 Neb. 207, 22 N. W. 422; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Chase v. Omaha L. & T. Co., 56 Neb. 358, 76 N. W. 896.

In Wright v. Schmidt, 47 Ia. 233, the court, in holding that the act of an attorney in signing a special administrator's bond for his client in violation of a statute prohibiting attorneys from becoming sureties on bonds did not render the obligation void, said: "But we cannot believe that an attorney who has secured for his principal, and, it may be, his client, all the benefits of a good and legal bond, can be permitted to shield himself behind the provisions of this section and thereby escape liability. Appellant cites no precedent for such a holding, and we are unwilling to Attys. at L. Vol. 1.—9

make one to authorize a party to so effectually take advantage of his own wrong. Appellant had no right to insist that the officer should accept him as a security; but having tendered himself as such and been accepted, thus depriving the interested parties of other security, he must perform the conditions of the contract into which he has voluntarily entered. Neither the interests of good morals would be promoted, nor respect for the law would be increased, by permitting him to escape."

In Holandsworth v. Com., 11 Bush (Ky.) 617, it does not clearly appear whether the relation of attorney and client existed between the parties; but the court, in holding that an obligation is not void if an attorney is accepted as bail contrary to a statute prohibiting him from becoming bail, said: "If those of the exempted or privileged classes persist in tendering themselves as bail, and, by becoming such, procure the discharge of persons accused of crime, they will not be heard to say that they are not bound because they violated the law. The best way to enforce obedience to the law is to punish its infraction; and if officials will break the barrier the law has erected for their protection, and

tent,<sup>15</sup> or liable on the bond.<sup>16</sup> Under some of the measures under discussion, it has been held that the proceedings, instituted in reliance on a bond given by an attorney, are themselves thereby affected; thus appeals have been dismissed,<sup>17</sup> and writs quashed,<sup>18</sup> even though the local law would hold the attorney responsible on the bond.<sup>19</sup> On the other hand, however, where only a rule of court has been violated, it seems that the appeal will not be dismissed,<sup>20</sup> but that other sureties may be substituted in lieu of the attorney.<sup>1</sup>

**§ 82. Attorney Acting as Notary Public in Client's Affairs.**—It has long been a court rule in England that an affidavit made before an attorney for the party taking the oath cannot be heard,<sup>2</sup> and this rule obtains not only at common law but in

shall suffer therefrom, they at least may learn caution for the future, and others may profit by their example."

<sup>15</sup> *Towle v. Bradley*, 2 S. D. 472, 50 N. W. 1057.

*In Wisconsin* a statute prohibiting practicing attorneys from becoming sureties has been held to be mandatory and absolutely to disqualify an attorney to act as surety. See *Cothren v. Connaughton*, 24 Wis. 134; *Branger v. Buttrick*, 30 Wis. 153; *Gilbank v. Stephenson*, 30 Wis. 155. Compare *Stark v. Small*, 72 Wis. 215, 39 N. W. 359.

<sup>16</sup> *Dennett v. Reisdorfer*, 15 S. D. 466, 90 N. W. 138.

<sup>17</sup> *Love v. Sheffelin*, 7 Fla. 40.

*No Jurisdiction on Appeal.*—Since a person cannot be surety for himself, an appeal bond signed by a judgment defendant, and an attorney in active practice, on an appeal from a justice's judgment to the superior court, is not sufficient to give the superior court jurisdiction. *Hudson v. Smith*, 111 Ia. 411, 82 N. W. 943.

<sup>18</sup> *Sherman v. State*, 4 Kan. 570; *Cook v. Caraway*, 29 Kan. 41.

<sup>19</sup> *Cook v. Caraway*, 29 Kan. 41.

<sup>20</sup> *De Jarnatt v. Marquez*, 127 Cal. 558, 60 Pac. 45, 78 Am. St. Rep. 90; *Hays v. Rush*, 8 Ohio Dec. (Reprint) 50, 5 Cine. L. Bul. 328.

<sup>1</sup> *Grahame v. Douglas*, Wright (Ohio) 738; *Hays v. Rush*, 8 Ohio Dec. (Reprint) 50, 5 Cine. L. Bul. 328.

<sup>2</sup> *Hopkinson v. Buckley*, 8 Taunt. 74, 4 E. C. L. 23; *Jenkins v. Mason*, 3 Moo. C. Pl. 325, 4 E. C. L. 434; *Rex v. Wallace*, 3 T. R. (Eng.) 403; *Rex v. Goaler*, 2 Ken. K. B. pt. 1 (Eng.) 421; *Northumberland v. Todd*, 7 Ch. D. (Eng.) 777; *Batt v. Vaisey*, 1 Price (Eng.) 116; *Smith v. Woodroffe*, 6 Price (Eng.) 230; *Cooper v. Archer*, 12 Price (Eng.) 149; *Horsfall v. Matthewman*, 3 M. & S. (Eng.) 154. See also *Turner v. Bates*, 10 Q. B. 292, 59 E. C. L. 292; *Doe v. Roe*, 8 Dowl. (Eng.) 340.

*Affidavits to Hold to Bail.*—By a rule of the Court of King's Bench,

equity;<sup>3</sup> but it must expressly appear that the notary public was an attorney of record, in a pending suit, for the party taking the oath, at the time the affidavit was made.<sup>4</sup> Following the English rule, it is held in a number of other jurisdictions that, on the ground that such practice is of doubtful propriety, a notary public who is an attorney for one of the parties in a pending cause cannot take his client's affidavit therein, and that if he does so the affidavit will not be received. In some states this rule has received statutory recognition, and in such cases the effect of the affidavit will, of course, be measured by the language of the act.<sup>5</sup>

Trinity Term, 15 Geo. II., affidavits to hold to bail are made an exception to the rule, and such affidavits may be made before the attorney or solicitor in the cause. *Reg. v. Steadman*, 12 N. Bruns. 368; *McManus v. Wells*, 29 N. Bruns. 449; *Tidds K. B. Pr.* 494. See also *Brett v. Smith*, 1 Ont. Pr. 309; *McLean v. Weeks*, 61 Me. 277.

<sup>3</sup> *Matter of Hogan*, 3 Atk. (Eng.) 813.

<sup>4</sup> *Beaumont v. Dean*, 4 Dowl. (Eng.) 354; *Kidd v. Davis*, 5 Dowl. (Eng.) 568.

<sup>5</sup> *Arkansas*.—*Hammond v. Freeman*, 9 Ark. 62; *Coleman v. Frauenthal*, 46 Ark. 302.

*Colorado*.—*Anderson v. Sloan*, 1 Colo. 33; *Martin v. Skehan*, 2 Colo. 614; *Frybarger v. McMillen*, 15 Colo. 349, 25 Pac. 713.

*Georgia*.—*Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374; *Nichols v. Hampton*, 46 Ga. 253; *Moultrie Lumber Co. v. Jenkins*, 121 Ga. 721, 49 S. E. 678.

*Kansas*.—*Tootle v. Smith*, 34 Kan. 27, 7 Pac. 577; *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436; *Schoen v. Sunderland*, 39 Kan. 758, 18 Pac. 913.

*Michigan*.—*McCaslin v. Camp*, 26 Mich. 390; *Snyder v. Hemmingway*, 47 Mich. 549, 11 N. W. 381; *Brad-*

*ley v. Andrews*, 51 Mich. 100, 16 N. W. 250; *Sullivan v. Hall*, 86 Mich. 7, 48 N. W. 646, 13 L.R.A. 556. See also *Thomas E. Lynch Co. v. Wayne Circuit Judge*, 129 Mich. 110, 88 N. W. 387; *Chamberlain v. Saginaw*, 135 Mich. 61, 97 N. W. 156.

*Nebraska*.—*Collins v. Stewart*, 10 Neb. 52, 20 N. W. 11; *Horkey v. Kendall*, 53 Neb. 522, 73 N. W. 953.

*New Jersey*.—*Den v. Geiger*, 9 N. J. L. 225; *Pullen v. Pullen*, 17 Atl. 310.

*New York*.—*Adams v. Mills*, 3 How. Pr. 219; *Anonymous*, 4 How. Pr. 290; *Post v. Coleman*, 9 How. Pr. 64; *Bliss v. Molter*, 58 How. Pr. 112; *People v. Spalding*, 2 Paige, 326; *Griffin v. Borst*, 4 Wend. 195; *Vary v. Godfrey*, 6 Cow. 587; *Taylor v. Hatch*, 12 Johns. 340; *Willard v. Judd*, 15 Johns. 531; *Hallenback v. Whitaker*, 17 Johns. 2; *Kuh v. Barnett*, 57 Super. Ct. 234, 6 N. Y. S. 881.

*Ohio*.—*Ward v. Ward*, 10 Ohio Cir. Dec. 656.

*Oklahoma*.—*Shanholtzer v. Thompson*, 24 Okla. 198, 103 Pac. 595, 138 Am. St. Rep. 877; *Crawford v. Ferguson*, 5 Okla. Crim. 377, 115 Pac. 278.

*Pennsylvania*.—*Wilhelmi v. Wilhelmi*, 9 Pa. Dist. Ct. 685 (affidavit to libel in divorce).

*Texas*.—*McGinse v. State*, 141 S.

It has been held, however, that the rule excluding affidavits made before the affiant's attorney is purely technical, and will not be extended.<sup>6</sup> Thus it has been held that the rule does not apply where suit has not been commenced;<sup>7</sup> nor does it extend to a partner of the attorney on record, although he is interested in the profits of the business.<sup>8</sup> So it has been held that an affidavit taken in violation of the rule is not void, but merely voidable,<sup>9</sup> and may be cured by amendment.<sup>10</sup> In some jurisdictions it is held that an attorney who is also a notary public may take his client's oath to an affidavit, and that the affidavit will be received, there being no statutory objection thereto;<sup>11</sup> but such practice does not meet with the

W. 268; *Williams v. State*, 144 S. W. 622; *Stapp v. State*, 144 S. W. 941; *Hogan v. State*, 147 S. W. 871; *Pullen v. State*, 156 S. W. 935; *Luttrell v. State*, 157 S. W. 157.

*Canada*.—*Gosselin v. Bergevin*, 11 Quebec Super. Ct. 288; *Dunsmuir v. Klondike, etc., Gold Fields*, 6 British Columbia 200.

<sup>6</sup> *Griffin v. Borst*, 4 Wend. (N. Y.) 195; *Willard v. Judd*, 15 Johns. (N. Y.) 531.

*Taking Deposition*.—An attorney of a party in obtaining a judgment may act as commissioner in taking a deposition for his client, to be used in a claim suit growing out of the judgment, he not being the attorney in the claim suit, and it not being shown that he has any interest in the event of the suit. *Taylor v. Branch Bank*, 14 Ala. 633.

<sup>7</sup> *Carr v. Hooper*, 48 Kan. 253, 29 Pac. 398; *Adams v. Mills*, 3 How. Pr. (N. Y.) 219; *Post v. Coleman*, 9 How. Pr. (N. Y.) 64; *Vary v. Godfrey*, 6 Cow. (N. Y.) 587; *People v. Spalding*, 2 Paige (N. Y.) 320.

<sup>8</sup> *Hallenback v. Whitaker*, 17 Johns. (N. Y.) 2.

<sup>9</sup> *Coleman v. Frauenthal*, 46 Ark. 302; *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123; *Hollenbeck v. Detrick*,

162 Ill. 388, 44 N. E. 732; *Phillips v. Phillips*, 185 Ill. 629, 57 N. E. 796; *Gilmore v. Hempstead*, 4 How. Pr. (N. Y.) 153.

The Michigan statute (1 Comp. Laws, § 2640) making it unlawful for notaries public who are also attorneys to administer oaths in causes in which they are engaged professionally, does not invalidate a claim against a city for damages for personal injuries, which is sworn to before a notary public who subsequently brings suit for the injuries as attorney for the claimant. *Allen v. West Bay City*, 140 Mich. 111, 6 Ann. Cas. 35, 103 N. W. 514.

<sup>10</sup> *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436; *Dobry v. Western Mfg. Co.*, 57 Neb. 228, 77 N. W. 656.

<sup>11</sup> *United States*.—*Atkinson v. Glenn*, 4 Cranch (C. C.) 134, 2 Fed. Cas. No. 610.

*California*.—*Kuhland v. Sedgwick*, 17 Cal. 123; *Reavis v. Cowell*, 56 Cal.

*Florida*.—*Savage v. Parker*, 53 Fla. 1002, 43 So. 507.

*Illinois*.—*Richardson v. Sheehan*, 46 Ill. App. 528, reversed on other grounds 147 Ill. 366, 35 N. E. 619; *Evans v. Schriver Laundry Co.*, 57 Ill. App. 150. See also *MacKenzie v. MacKenzie*, 238 Ill. 616, 87 N. E. 848.

approval of the courts even though they deem the act valid.<sup>12</sup>

### *Libel and Slander.*

§ 83. **Generally.** — Words which are written concerning a person in his business, occupation or profession, and which impute to him a lack of knowledge, skill or integrity in such business, occupation or profession, and which thereby tend to injure him therein, are libelous *per se*, even though they would not be so actionable if spoken or written of one not engaged in such business, occupation or profession.<sup>13</sup> Thus words published of a lawyer with respect to his profession, and which tend to injure or disgrace him therein, are held to be actionable *per se*.<sup>14</sup> But to be actionable because spoken of an attorney and counselor at law, the words

*Indiana.*—*Yeagley v. Webb*, 86 Ind. 424.

*Massachusetts.*—*McDonald v. Willis*, 143 Mass. 452, 9 N. E. 835.

*Minnesota.*—*Young v. Young*, 18 Minn. 90.

*Missouri.*—*Smith v. Ponath*, 17 Mo. App. 262.

*New Mexico.*—*Genest v. Las Vegas Masonic Bldg. Assoc.*, 11 N. M. 251, 67 Pac. 743.

*Texas.*—*Kosminsky v. Raymond*, 20 Tex. Civ. App. 702, 51 S. W. 51; *Ryburn v. Moore*, 72 Tex. 85, 10 S. W. 393. See also *Bradberry v. State*, 7 Tex. App. 375.

*Wisconsin.*—*Dawes v. Glasgow*, 1 Pinn. 171.

<sup>12</sup> *Allis v. Stowell*, 85 Fed. 481; *Savage v. Parker*, 53 Fla. 1002, 43 So. 507; *Linck v. Litchfield*, 141 Ill. 469, 31 N. E. 123; *Hollenbeck v. De-trick*, 162 Ill. 388, 44 N. E. 732; *Phillips v. Phillips*, 185 Ill. 629, 57 N. E. 796.

<sup>13</sup> *White v. Nichols*, 3 How. 285, 11 U. S. (L. ed.) 600; *Nicholas v. Daily Reporter Co.*, 30 Utah 74, 8 Ann.

Cas. 841, 83 Pac. 573, 116 Am. St. Rep. 796, 3 L.R.A. (N.S.) 339.

<sup>14</sup> *Riggs v. Denniston*, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; *Mat-tice v. Wilcox*, 59 Hun 620 mem., 36 N. Y. St. Rep. 914; *Gibson v. Sun Printing, etc. Assoc.*, 71 App. Div. 566, 76 N. Y. S. 197; *Chipman v. Cook*, 2 Tyler (Vt.) 456. See also *Register Newspaper Co. v. Worten*, 111 S. W. 693, 33 Ky. L. Rep. 840; *Sanford v. Bennett*, 24 N. Y. 20.

*Damages.*—Proof of the extent of the plaintiff's practice is admissible on the question of damages. *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129, wherein the court said: "Plaintiff was a lawyer engaged in the practice of his profession. The words of the publication being admittedly libelous *per se*, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. General damages, in an action where the words are libelous

must be spoken of his professional character and conduct, and must be of such description as directly to touch that professional character and conduct. If the words themselves be not of this description and character, no finding of a jury or explanation by innuendo can make them actionable.<sup>15</sup> Thus it has been held that in an action on a charge of fraud against an attorney, as mayor of a city, a declaration is not sufficient to justify the court in submitting to the jury the question of damages in his profession unless it connects the libelous charge by the proper colloquium with his profession and alleges special damage.<sup>16</sup> Where, however, the publication is libelous *per se*, without reference to the professional character of the plaintiff, the plaintiff may connect the libelous words with his professional character, and recover the natural and proximate damages to him, in his profession, resulting therefrom.<sup>17</sup>

*per se*, are such as compensate for the natural and probable consequences of the libel, and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice."

<sup>15</sup> *Dauncey v. Holloway*, [1901] 2 K. B. (Eng.) 441; *Keene v. Tribune Assoc.*, 76 Hun 488, 27 N. Y. S. 1045; *Goodenow v. Tappan*, 1 Ohio 60.

*An Attempted Justification* of the charge of professional misconduct is insufficient which does not show that the plaintiff was acting in his professional capacity in doing what he was charged with, or that he had been employed as an attorney by some one connected with the transaction. *Brown v. Burnett*, 10 Ill App. 279.

<sup>16</sup> *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63, 7 Detroit Leg. N. 550, followed in *Line v. Spies*, 139 Mich. 484, 102 N. W. 993.

<sup>17</sup> *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105.

In a case wherein it appeared that the plaintiff, an attorney and judge,

complained of a reference to him as an "unscrupulous office holder," and as not a fit and competent servant of the people, and as one who exempted his political friends from punishment, it was held that the language was libelous *per se*, but that, since there was no allegation that the libelous matter was published concerning the plaintiff in his office as judge or as solicitor or attorney, he was confined to such damages as he might be able to prove he had sustained in his private character. *Stewart v. Codrington*, 55 Fla. 327, 45 So. 809.

Where it was charged that a notary public certified the acknowledgment of ten persons as having been taken by him to a bond, and that the persons purporting to sign it did not know that their names were on the bond, it was held that no extrinsic facts were needed to show that the words were capable of a libelous meaning in themselves. *Henderson v. Commercial Advertiser Assoc.*, 46 Hun 504, 12 N. Y. St. Rep. 649, affirmed 111 N. Y. 685, 19 N. E. 286.

In disbarment proceedings the attorney for the petitioner is privileged in drafting and printing questions impliedly damaging to the character of the accused, and in submitting such printed questions to persons who are to be called as witnesses, and such privilege extends to the printer employed by him.<sup>18</sup> But a newspaper report of the contents of a petition for the removal of plaintiff from the bar, the petition including allegations which would be actionable unless justified, is not privileged, although the report is fair and accurate.<sup>19</sup>

**§ 84. Actionable Language.** — A charge against a lawyer of want of fidelity in his profession, in offering to divulge the secrets intrusted to him by his client, is libelous *per se*.<sup>20</sup> Statements charging an attorney, in effect, with giving dishonest and unprofessional advice, making false statements in professional dealings, incurring loss of confidence by misconduct, embezzling moneys, making false charges for services, and extorting excessive compensation are libelous on their face.<sup>21</sup> It is libelous *per se* to write of a lawyer that he is dishonest, and that he has been guilty

In *Clark v. Anderson*, 11 N. Y. S. 720, it was held that it was at least a question for the jury whether a charge of conspiracy to swindle had a tendency to injure the plaintiff in his business or occupation.

A circular reading as follows: "Make Burr Mattice attorney for the village, so that every person that gets spanked on the ice will be able to obtain a judgment from one thousand dollars to ten thousand dollars against the village," meaning thereby to charge the plaintiff with want of skill and care as the attorney for the village, has been held libelous *per se*. *Mattice v. Wilcox*, 71 Hun 487, 24 N. Y. S. 1060, *affirmed* 147 N. Y. 624, 42 N. E. 270, 59 Hun 620, *mem.* 13 N. Y. S. 330, *affirmed with-*

*out opinion* 120 N. Y. 633, 29 N. E. 1030.

It is actionable *per se* to say of a lawyer, "He is not a member of this bar. He is a fraud. He never has been admitted to practice law, and has no right to appear for any one, and that if never admitted he never could be admitted." *Goldrick v. Levy*, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20.

<sup>18</sup> *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265.

<sup>19</sup> *Rex v. Wright*, 8 T. R. (Eng.) 293; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318.

<sup>20</sup> *Riggs v. Denniston*, 3 John. Cas. (N. Y.) 198, 2 Am. Dec. 145.

<sup>21</sup> *Atkinson v. Detroit Free Press*, 46 Mich. 341, 9 N. W. 501.

of a breach of trust by appropriating his client's property to his own use.<sup>1</sup>

Any oral or written words which impute to an attorney at law the want of requisite qualifications to practice law, or which charge him with having been guilty of corrupt, dishonest, or improper practice in the performance of his duties as a lawyer, are actionable *per se*.<sup>2</sup> To impute a corrupt or dishonorable action to an attorney, in the unlawful settling of a criminal prosecution, is actionable *per se* though it falls short of a charge of bribery.<sup>3</sup>

It has been held libelous to speak as follows of a lawyer: "He is a damned rascal and an immoral and base man; and unless ignorance of law makes a lawyer, he is no lawyer. He is an ambidexter and a disgrace to his profession."<sup>4</sup>

A charge that "you are the dirty sewer through which all the slums of this embezzlement have flowed," spoken of an attorney in his profession, is actionable *per se*.<sup>5</sup>

It has been held libelous to charge an attorney with making an arrangement with a client whereby the attorney undertook to prosecute the latter's action at his own expense in consideration of a division of the amount, if any, which should be collected upon the

<sup>1</sup> See *Cole v. Wilson*, 18 B. Mon. (Ky.) 212.

In *Pierce v. Rodliff*, 95 Me. 346, 50 Atl. 32, the following advertisement was published in a newspaper: "Wanted. All persons that have put bills for collection in hands of Thos. H. B. Pierce of Dexter from the year 1885 to August 1899, and received unsatisfactory returns, are requested to communicate with X. Y. Z. Post-Office, Dexter, Me.," the meaning whereof, according to the innuendo in the plaintiff's declaration, was that the plaintiff had since 1885 been conducting his business as an attorney dishonestly and unsatisfactorily to his clients, and had not paid over moneys collected as his duty required. The presiding judge instructed the

jury as follows: "I instruct you, as a matter of law, that the advertisement is susceptible of the meaning that is put upon it by the plaintiff in his writ. It is susceptible of that meaning, but you will determine whether or not it is so understood, whether or not that is the real meaning to be put to it, and if you find that it is, then, gentlemen, it is libelous."

<sup>2</sup> *Montgomery v. New Era Printing Co.*, 229 Pa. St. 165, Ann. Cas. 1912 A 375, 78 Atl. 85.

<sup>3</sup> *Wallace v. Jameson*, 179 Pa. St. 98, 36 Atl. 142.

<sup>4</sup> *Goodenow v. Tappan*, 1 Ohio 61.

<sup>5</sup> *Mains v. Whiting*, 87 Mich. 172, 49 N. W. 559.



claim.<sup>6</sup> A charge that a village attorney has been guilty, as such, of perjury and graft, and that he is either woefully incompetent or a consummate pettifogger, is libelous.<sup>7</sup> A statement with reference to a lawyer who had been counsel for the treasury department, that his removal from such office on the ground of inefficiency had been recommended as the result of an investigation of his office, is libelous.<sup>8</sup> A newspaper article reflecting upon the professional conduct of an attorney is libelous.<sup>9</sup> It is libelous for

<sup>6</sup> *Gaudet v. Esplin*, 9 Quebec Super. Ct. 210.

<sup>7</sup> *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547. See also the report of the same case in 151 Mich. 59, 114 N. W. 865. It is libelous *per se* to write of an attorney: "We are looking into the doings of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that Mosnat had put a lien on the John Zeller estate for \$1,250 on account of the heirs you represent, and \$500 extra to fight the church, making \$1750 for one and the same thing. 'OUTRAGE!'" *Mosnat v. Snyder*, 105 Ia. 500, 75 N. W. 356, wherein the court said: "The language of the paragraph, to us, admits of no other conclusion than that the plaintiff, in his professional capacity, had acted outrageously dishonest in taking from the estate. The other language of the letter intensifies, rather than weakens, such a conclusion, for it presents facts and figures from which the statement appears to be true; and they were evidently so intended. A quite conclusive test is this: If the statements fairly deducible from that letter are true, the plaintiff is not an honest man in his professional doings, and is not entitled to public confi-

dence. No discreet business man, believing those statements, would intrust him with business of such a character. Such a publication, of course, brings one into disrepute, and produces a perceptible injury, if not true. To test the question of the letter being libelous on its face, we treat the statements as untrue. It is not to be questioned that the letter imputed to the plaintiff gross professional misconduct."

<sup>8</sup> *Gibson v. Sun Printing, etc., Assoc.*, 71 App. Div. 566, 76 N. Y. S. 197.

In a case wherein the charge complained of was that the plaintiff, a city attorney, had resigned his office pending important litigation on the part of the city which had been induced by his advice, *Brewer, J.*, said: "The lawyer who has the reputation of advising his client into trouble, and then leaving him to get out of it the best way he can, is one who would be shunned by all prudent men in search of legal counsel and assistance; and to charge a lawyer with such a course of conduct is certainly calculated to make him infamous and odious in the sight of all." *Hetherington v. Sterry*, 28 Kan. 426, 42 Am. Rep. 169.

<sup>9</sup> *Reynolds v. Holland*, 46 Wash. 537, 90 Pac. 648.

a newspaper to write of a lawyer that he knows reasons too numerous to mention why he is unfit to be district attorney, or even to practice law, and to follow it up by the alleged particulars of the reasons too numerous to mention, including a charge of guilty conduct on the part of his brother, where the imputation contained in such charge is that the plaintiff had participated in the misconduct of his brother—either colluded with it, or at the very least connived at it.<sup>10</sup>

A newspaper heading stating that an opposing lawyer's brief in extradition proceedings had charged the plaintiff with perjury, has been held libelous.<sup>11</sup> A headline, "How lawyer Bishop treats his clients," has also been held libelous.<sup>12</sup> An article referring to a lawyer as "the lawyer, or fellow with a license to practice," and which states that the lawyer in question is the friend and companion of criminals, and that by reason of his intimacy and popularity with them he secures a large part of his practice, is libelous.<sup>13</sup>

An article charging a lawyer with presenting a bill twice for the same services in the same case imputes to him dishonest and dishonorable action in his professional capacity, and proof of the publication of such article establishes a *prima facie* case.<sup>14</sup> It is actionable *per se* to warn one against the employment of a certain attorney.<sup>15</sup> It has also been held libelous *per se* to say of a lawyer

<sup>10</sup> *Luzenburg v. O'Malley*, 116 La. 699, 41 So. 41.

<sup>11</sup> *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; *Brown v. Publishers George Knapp & Co.*, 213 Mo. 655, 112 S. W. 474.

<sup>12</sup> *Bishop v. Latimer*, 4 L. T. N. S. (Eng.) 775.

<sup>13</sup> *Register Newspaper Co. v. Worsten*, 111 S. W. 693, 33 Ky. L. Rep. 840.

<sup>14</sup> *Montgomery v. New Era Printing Co.*, 229 Pa. St. 165, Ann. Cas. 1912A, 375, 78 Atl. 85.

<sup>15</sup> *Brossoit v. Turcotte*, 20 L. C. Jur. 141.

In *Godson v. Home*, 1 Brod. & B. 7, 5 E. C. L. 3, 3 Moo. C. Pl. 223, it was held that it was for the jury to say whether the following language was a caution against employing attorneys in general or the plaintiff in particular: "If you will be misled by an attorney who only considers his own interest, you will have to repent it; you may think, when you have once ordered your attorney to write to Mr. Giles, he would not do any more without your further orders, but if you once set him about it, he will go to any length without further orders." The jury

that he is a cheat,<sup>16</sup> or that he is a "pettifogging shyster,"<sup>17</sup> or that he is a "shyster,"<sup>18</sup> or that he is a "jack leg lawyer,"<sup>19</sup> or that he is a "dunce,"<sup>20</sup> or that he is a "dishonest toad" imagining himself a lawyer,<sup>1</sup> or that he is an imposter upon the courts,<sup>2</sup> or that "he is only taking the matter up in order to get a fee out of you,"<sup>3</sup> or that he will get little by the law,<sup>4</sup> or that "he is a cheating knave, and takes extraordinary fees and extortion and hath no more wit than an owl,"<sup>5</sup> or to say, "Does he pretend to be a lawyer? He is no more a lawyer than the Devil."<sup>6</sup> So, also, it is libelous *per se* to charge a lawyer with soliciting business,<sup>7</sup> or with falsely personating a constable,<sup>8</sup> or with betraying his client,<sup>9</sup> or with being a horse thief,<sup>10</sup> or with "sharp practice,"<sup>11</sup> or with being a promoter of vexatious suits,<sup>12</sup> or with the misappropriation of money,<sup>13</sup> or with a wicked and corrupt disregard of his official oath,<sup>14</sup> or with asking fees which amount to petit larceny,<sup>15</sup> or with having been arrested on a criminal charge,<sup>16</sup> or with being as bad as his partner who

found a verdict for the plaintiff for one shilling.

<sup>16</sup> *Powers v. Cary*, 64 Me. 9; *Rush v. Cavanaugh*, 2 Pa. St. 187.

<sup>17</sup> *Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251.

<sup>18</sup> *Gribble v. Pioneer Press Co.* 34 Minn. 342, 25 N. W. 710.

<sup>19</sup> See *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425.

<sup>20</sup> *Peard v. Jones, Cro. Car. (Eng.)* 382.

<sup>1</sup> *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362.

<sup>2</sup> *Goldrick v. Levy*, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20.

<sup>3</sup> *Weber v. Credit Office*, 55 Misc. 386, 106 N. Y. S. 583.

<sup>4</sup> *Peard v. Jones, Cro. Car. (Eng.)* 382.

<sup>5</sup> *Scroop's Case*, Freem. K. B. (Eng.) 276.

<sup>6</sup> *Day v. Buller*, 3 Wils. C. Pl (Eng.) 59.

<sup>7</sup> *Register Newspaper Co. v. Worsten*, 111 S. W. 693, 33 Ky. L. Rep. 840.

<sup>8</sup> *McDermott v. Evening Journal Assoc.*, 43 N. J. L. 488, 39 Am. Rep. 606.

<sup>9</sup> *Ludwig v. Cramer*, 53 Wis. 193, 10 N. W. 81.

<sup>10</sup> *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 565.

<sup>11</sup> *Boydell v. Jones*, 4 M. & W. (Eng.) 446, 7 Dowl. 210, 1 H. & H. 408.

<sup>12</sup> *Rex v. Lake*, Freem. K. B. (Eng.) 14, 2 Vent. 28.

<sup>13</sup> *May v. Brown*, 3 B. & C. 113, 10 E. C. L. 24, 4 Dowl. & R. 670, 2 L. J. K. B. 212.

<sup>14</sup> *Barr v. Moore*, 87 Pa. St. 385, 30 Am. Rep. 367.

<sup>15</sup> *Ivey v. Pioneer Sav., etc., Co.*, 113 Ala. 349, 21 So. 531.

<sup>16</sup> *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129.

had been transported for embezzlement of the partnership funds,<sup>17</sup> or with the flagrant violation of his duties as an attorney,<sup>18</sup> or with failing to pay over to a client money he had received for her.<sup>19</sup>

It has been held that charging an attorney with ignorance in a particular case is not actionable *per se*.<sup>20</sup> But words which impute want of integrity are actionable although used only as to a single transaction.<sup>1</sup> So, also, are words which, although used in respect to a particular case, are general, and applicable to the relations between the attorney and all his clients.<sup>2</sup>

**§ 85. Nonactionable Language.** — A reference to a pamphlet written by a lawyer, as “the effusion of a crank,” is not in itself actionable.<sup>3</sup>

A publication is not injurious to an attorney, as such, which states that he was publicly whipped by a former female client whom he had previously insulted.<sup>4</sup> An article stating that an attorney was illegally put into jail is not libelous as reflecting upon his professional conduct, capacity or character.<sup>5</sup>

It has been held that it is not actionable *per se* to say of a lawyer, “He is a runaway—he broke out of jail in New England and fled from justice.”<sup>6</sup>

<sup>17</sup> *Jones v. Stevens*, 11 Price (Eng.) 235, 25 Rev. Rep. 714.

<sup>18</sup> *Hoey v. Fletcher*, 39 Fla. 325, 22 So. 716.

<sup>19</sup> *Marx v. Press Pub. Co.*, 134 N. Y. 561, 31 N. E. 918.

<sup>20</sup> *Foot v. Brown*, 8 Johns. (N. Y.) 64. Compare *Ludwig v. Cramer*, 53 Wis. 193, 10 N. W. 81.

<sup>1</sup> *Garr v. Selden*, 6 Barb. 416, reversed on other grounds 4 N. Y. 91.

<sup>2</sup> *Bishop v. Latimer*, 4 L. T. N. S. (Eng.) 775.

<sup>3</sup> *Walker v. Tribune Co.*, 29 Fed. 827.

<sup>4</sup> *Sherin v. Eastwood*, 27 S. D. 312, 131 N. W. 287, wherein the court said: “The only matter which, even by implication, could be held to charge appellant with unprofessional

conduct, is the statement that at one time when his assailant had visited him as a client, he had insulted her. There was no pleading by way of innuendo, nor any attempt by proof to show that by the use of the word ‘insult’ it was intended and would be understood as setting forth any criminal or even unchaste conduct upon the part of the appellant. There might have been many causes which would lead the appellant to to have made charges in the nature of insults against a client which in no manner would reflect upon his professional conduct as an attorney.”

<sup>5</sup> *Hughes v. New York Evening Post Co.*, 115 App. Div. 611, 100 N. Y. S. 982.

<sup>6</sup> *Goodnow v. Tappan*, 1 Ohio 61.

The words, "He is crazy; he is top-heavy; he has a soft spot in his head," when spoken of a lawyer, have been held to be mere vituperation and abuse, without reference to his professional character, and not actionable *per se*.<sup>7</sup> A charge of lewdness, although alleged to concern an attorney in his professional capacity, does not impute professional misconduct.<sup>8</sup>

A statement that an attorney "has moved his office up to his house to save expense" is not actionable *per se*.<sup>9</sup> Lord Kenyon said that it was not actionable to say of an attorney: "I have taken out a judge's warrant to tax Phillips's bill; I'll bring him to book and shall have him struck off the roll." His lordship added, "Had the words been, 'He deserves to be struck off the roll,' they would have been actionable."<sup>10</sup>

It has also been held that it was not actionable *per se* to speak of a solicitor as follows: "Have you heard about our neighbor along here? They tell me he has gone for thousands instead of hundreds this time. . . . Have you heard anything about Mr. Dauncey? It seems to be a worse job than the other was. I was putting up a bell in Miss Allen's shop, and Miss Allen told me Mr. Dauncey has lost thousands."<sup>11</sup> So, it seems, it is not actionable *per se* to charge an attorney with having defrauded his creditors,<sup>12</sup> or with being slow in the payment of his bills,<sup>13</sup> or to charge him

<sup>7</sup> Goldrick v. Levy, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20.

<sup>8</sup> Powers v. Cary, 64 Me. 9.

<sup>9</sup> Stewart v. Minnesota Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St. Rep. 696.

<sup>10</sup> Phillips v. Jansen, 2 Esp. (Eng.) 624.

<sup>11</sup> Dauncey v. Holloway [1901] 2 K. B. (Eng.) 441.

<sup>12</sup> Dorley v. Roberts, 3 Bing. N. Cas. 835, 32 E. C. L. 346, 5 Scott 40, 3 Hodges 154, 6 L. J. C. Pl. 279.

<sup>13</sup> A reference, in a book published by a commercial agency, to an attorney as slow in the payment of his bills, which does not charge that he is dishonest or insolvent or does not

keep his promises, has been held, by a closely divided court, not to be actionable *per se* as concerning him in his profession. McDermott v. Union Credit Co. 76 Minn. 84, 78 N. W. 967, 79 N. W. 673, wherein Mitchell, J., said: "As a publication addressed to retail dealers, it presumably, if not necessarily, referred to his habit in the matter of paying his personal bills. The head and front of the publication is that plaintiff is slow in the payment of his bills, but not to the extent that his promises are not kept, or that it is necessary to place a claim in the hands of a collector, or to put into judgment, in order to secure pay-

with a delay of fifteen years in delivering a bill for services rendered to a testator.<sup>14</sup>

In a case wherein it appeared that the defendant had told a person who had employed the plaintiff as a solicitor, that the latter was a dirty man and that if he, the client, had an honorable man to work for him he might win his case, the court was inclined to think that the words spoken were not actionable without an innuendo.<sup>15</sup>

A publication charging that an attorney's wife had died under circumstances which had aroused her husband's suspicion that she had caused her own death by procuring a miscarriage upon her person, is not a charge against the professional character of the plaintiff, and does not, in the view of the law, injure him as a lawyer.<sup>16</sup>

ment, or that he ever disputes his bills. An attorney, like any other man, may for various reasons be slow, to the extent of not paying his personal bills promptly, weekly or monthly, and yet be not only honest and solvent, but also entirely prompt in the performance of his professional duties, and in accounting for and paying over all property or money of his clients which may come into his hands. It is possible that anything published in disparagement, however slight, of a person as an individual may incidentally affect him somewhat in his business or profession; but it does not necessarily follow that the words are actionable, *per se*, as published of and concerning him in relation to his profession or business. Any such rule would open the door for a flood of vexatious litigation. To be actionable on that ground alone, the publication must be such as would naturally and directly affect him prejudicially in his profession or business. Hence our opinion is that

if the publication in this case is, *per se*, actionable under the allegation of the complaint, it must be because it is actionable *per se* when published of a person as an individual, without reference to his particular profession or business." Collins, J., said: "I concur in the result, but do not feel quite prepared to say that printed matter in which a practicing attorney is charged with being slow in the payment of his debts does not tend to injure him in his professional standing, and lower him in that confidence of the community which every attorney must have, to succeed. My impression is decidedly to the contrary."

<sup>14</sup> *Reeves v. Templar*, 2 Jur. (Eng.) 137 (decided under the rule that ambiguous words are to be construed *mitiori sensu*).

<sup>15</sup> *Tobin v. Gannon*, 34 Nova Scotia 9.

<sup>16</sup> *Wellman v. Sun Printing, etc., Co.*, 66 Hun 331, 21 N. Y. S. 577.

## CHAPTER V.

### ASSIGNMENT OF COUNSEL BY THE COURT—AMICUS CURIAE.

#### *Assignment of Counsel by the Court.*

- § 86. Assignment of Counsel for Poor Persons in Civil Cases.
- 87. In Criminal Cases.
- 88. Appointment of Counsel for Absentees.

#### *Amicus Curiae.*

- 89. Generally.
- 90. Status of *Amici Curiae*.
- 91. Power and Functions.

#### *Assignment of Counsel by the Court.*

§ 86. Assignment of Counsel for Poor Persons in Civil Cases. — In many jurisdictions poor persons are permitted to institute civil proceedings *in forma pauperis*,<sup>1</sup> and in such cases, either by virtue of statute or rule of court, it is customary to assign counsel to represent them.<sup>2</sup> When a lawyer takes his license

<sup>1</sup> A *Federal Statute* provides that "any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress

he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action." Act of July 20, 1892, § 1 (2 Fed. St. Ann. 294).

<sup>2</sup> *Lewis v. Kennett*, 3 Russ. (Eng.) 466; *Welford v. Daniell*, 9 Sim. (Eng.) 652; *Whelan v. Manhattan R. Co.* 86 Fed. 219; *Webb v. Baird*, 6 Ind. 13; *Kerr v. State*, 35 Ind. 288; *Wright v. McLarinan*, 92 Ind. 103; *Daus v. Nussberger*, 25 App. Div. 185, 49 N. Y. S. 291; *House v. Whitis*, 5 Baxt. (Tenn.) 690; *Dempsey v. Lawrence*, Gilmer (Va.) 333.

*The Federal Statute* on this subject provides that "the court may request

he takes it burdened with certain honorary obligations. He is a sworn minister of justice, and when commanded by the court he cannot withhold his services in cases prosecuted *in forma pauperis*.<sup>3</sup> The court is not obliged to assign to a party the attorney designated by him;<sup>4</sup> nor, unless it is provided for by statute, is there any legal duty resting on the court to appoint counsel for poor persons in civil cases.<sup>5</sup>

**§ 87. In Criminal Cases.** — Where it appears that persons charged with the commission of a crime are destitute, the universal practice is for the court to appoint counsel for them. In several states this matter is covered by statute.<sup>6</sup> In the absence of

any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." Act of July 20, 1892, § 4 (2 Fed. St. Ann. 294). 294.)

*The New York Code* provides that a poor person, whether an adult or infant, not being of ability to sue, who alleges that he has a cause of action against another person, may apply by petition to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action. § 458 N. Y. Code Civ. Pro.

And that a defendant in an action involving his right, title, or interest in or to real or personal property, may petition the court in which the action is pending for leave to defend the action as a poor person, and to have an attorney and counsel as-

signed to conduct his defense. § 463 N. Y. Code Civ. Pro.

<sup>3</sup> *House v. Whitis*, 5 Baxt. (Tenn.) 690.

<sup>4</sup> *Helmprecht v. Bowen*, 87 Hun 362, 34 N. Y. S. 1141.

In *Harris v. Mutual L. Ins. Co.*, 59 Hun 625 mem., 20 Civ. Pro. 192, 13 N. Y. S. 718, Van Brunt, P. J., said: "The court should not assign as counsel the attorney making the application, except in exceptional cases, and then only where it clearly appears that the party seeking to sue as a poor person knows that the counsel assigned is bound to act in the action without compensation, and where the counsel certifies to the court that he will so act, and that no charge or claim for counsel fees by anybody will be made. In most cases, however, in order to prevent abuses, a person entirely disconnected with the proceeding should be appointed, who will see that improper use is not made of the privilege granted."

<sup>5</sup> *Leahy v. Dunlap*, 6 Colo. 552.

<sup>6</sup> *Statutory Regulation*.—The appointment by courts of attorneys to defend indigent persons accused of



such regulation, however, there is no doubt that the court, even though there is no rule to that effect, may assign counsel for the defense of poor prisoners.<sup>7</sup> And it is the duty of counsel so designated to give their professional assistance,<sup>8</sup> when not inconsistent with their duties to others,<sup>9</sup> though the weight of authority is to the effect that a statute requiring counsel to give their services without compensation is unconstitutional.<sup>10</sup> Where the assign-

crime, who are without counsel and without the means of employing legal assistance, is not, properly speaking, the exercise of a fundamental right or power inherent in the court, but such authority is implied from the jurisdiction and powers expressly conferred, and functions and duties imposed, and the general statutes and policy of the state providing for the necessities of the poor, which reasonably include a fair opportunity to protect their rights as litigants in courts of justice. As the power to make such appointment emanates directly or indirectly from the legislature, it follows that its exercise is subject to the regulation and control of that department. *Clay County v. McGregor*, 171 Ind. 634, 17 Ann. Cas. 333, 87 N. E. 1.

<sup>7</sup> *California*.—*Rowe v. Yuba County*, 17 Cal. 61.

*Florida*.—*Cutts v. State*, 54 Fla. 21, 45 So. 491.

*Illinois*.—*Wise v. Hamilton County*, 19 Ill. 78.

*Indiana*.—*Hendryx v. State*, 130 Ind. 265, 20 N. E. 1131; *Cross v. State*, 132 Ind. 65, 31 N. E. 473.

*Iowa*.—*Hall v. Washington County*, 2 Greene 473.

*Montana*.—*Johnston v. Lewis, etc. County*, 2 Mont. 159.

*New York*.—§ 308 Code of Crim. Pro.

*Pennsylvania*.—*Wayne County v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636.

*Texas*.—*Pennington v. State*, 13 Tex. App. 44.

*Virginia*.—*Early v. Com.*, 86 Va. 921, 11 S. E. 795.

*On Appeal*.—The Supreme Court has no authority to appoint an attorney to prosecute an appeal for a poor person, the attorney appointed by the court below having full authority to do so. *Stout v. State*, 90 Ind. 1.

Code Ala. 1907, § 7839, providing that where accused, indicted for a capital offense, is unable to employ counsel, the court must appoint counsel, does not authorize the trial court to appoint counsel in the Supreme Court or in the Appellate Court. *Campbell v. State*, (Ala.) 62 So. 57.

<sup>8</sup> *Cutts v. State*, 54 Fla. 21, 45 So. 491.

Mandamus will not lie to compel the circuit judge to appoint an attorney for a poor person where a motion for such appointment is pending, and there is no such delay in deciding the same as to raise the inference of a refusal to decide it. *Baker v. State*, 86 Wis. 474, 56 N. W. 1088.

<sup>9</sup> *Rowe v. Yuba County*, 17 Cal. 61.

<sup>10</sup> *Blythe v. State*, 4 Ind. 525; *Webb v. Baird*, 6 Ind. 13; *Howard County v. Pollard*, 153 Ind. 371, 55 N. E. 87; *Clay County v. McGregor*, 171

ment of counsel is provided for by statute it is error to refuse counsel to a poor person, charged with crime, who requests such assistance;<sup>11</sup> but it is not error to fail to assign counsel where no request therefor is made.<sup>12</sup> Nor can the courts require the accused to secure counsel or impose counsel upon him, unless he requests the court so to do.<sup>13</sup> The defendant must accept the services of any reputable attorney whom the court, in its discretion, may see fit to appoint, unless, of course, it is otherwise provided by statute.<sup>14</sup> The number of counsel who shall be appointed to defend an indigent prisoner, unless limited by statute, rests in the judicial discretion of the court,<sup>15</sup> and an appellate court will not interfere with

Ind. 634, 17 Ann. Cas. 333, 87 N. W. 1; *Knight v. Board of Com'rs of Clay County*, (Ind.) 101 N. E. 1010; *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754. *Contra*, *Brown v. Warren County*, (Ia.) 135 N. W. 4, 42 L.R.A. (N.S.) 527; *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876.

<sup>11</sup> *Hendryx v. State*, 130 Ind. 265, 29 N. E. 1131.

<sup>12</sup> *State v. De Serrant*, 33 La. Ann. 979; *State v. Vianna*, 37 La. Ann. 606; *State v. Whitesides*, 49 La. Ann. 352, 21 So. 540; *State v. Rollins*, 50 La. Ann. 925, 24 So. 664; *People v. Cook*, 45 Hun 34, 9 N. Y. St. Rep. 412; *Gutierrez v. State*, (Tex.) 47 S. W. 372.

A failure to apply for the assignment of counsel indicates a waiver of the right to have the assistance of counsel. *State v. Raney*, 63 N. J. L. 363, 43 Atl. 677.

In *Cutts v. State*, 54 Fla. 21, 45 So. 491, the court said: "It has been the general practice in trial courts in this state, when a party charged with felony has been brought to the bar for arraignment, to inquire of the accused whether he had counsel to

represent him, and if upon inquiry it developed that he had no attorney and was unable to employ one, to ask the accused whether he desired one to represent him. If he signified his desire to be represented by counsel, then it has been the practice for the trial judge to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of section 2 of the Bill of Rights, and section 3969 of the General Statutes of 1906."

<sup>13</sup> *Schwartz v. State*, (Miss.) 60 So. 732; *Dietz v. State*, 149 Wis. 462, Ann. Cas. 1913C 732, 136 N. W. 166.

<sup>14</sup> *Andersen v. Treat*, 172 U. S. 24, 19 S. Ct. 67, 43 U. S. (L. ed.) 351; *Burton v. State*, 75 Ind. 477; *People v. Fuller*, 35 Misc. 189, 15 N. Y. Crim. 473, 71 N. Y. S. 487; *Baker v. State*, 86 Wis. 474 note, 56 N. W. 1088.

The Supreme Court will not assign, as counsel, one who has been admitted to practice only in the Common Pleas. *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

<sup>15</sup> *Gordan v. Dearborn County*, 52 Ind. 322; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *People v. Fitch*, 51 N. Y. S. 683; *People v. Heiselbetz*,

the exercise of such discretion unless it clearly appears that the discretion was so abused as to result in an injustice to the accused.<sup>16</sup>

**§ 88. Appointment of Counsel for Absentees.** — In some jurisdictions, under statutory authority, counsel are appointed for nonresident defendants who, because of having property within the jurisdiction, were properly sued therein, and who failed to appear in answer to such suit.<sup>17</sup>

Thus the Louisiana Civil Code provides that "when a person possessed of either movable or immovable property within this state shall be absent, or shall reside out of the state, without having appointed somebody to take care of his estate, or when the person thus appointed dies, or is either unable or unwilling to continue to administer that estate, then and in that case, the judge of the place where that estate is situated shall appoint a curator to administer the same."<sup>18</sup> Attorneys so appointed are merely statutory appointees, their powers, rights, duties, and liabilities are usually fixed by the statute, or possibly by rule or order of court. In all such cases the local laws and rules of court must be consulted.

### *Amicus Curiae.*

**§ 89. Generally.** — The term *amicus curiae* implies the friendly intervention of counsel to remind the court of some matter of law which might otherwise escape its notice, and in regard to which it might go wrong. Such an intervention is granted, not as a matter of right, but of privilege, and the privilege ends when the

26 Misc. 100, 55 N. Y. S. 4, *affirmed*  
30 App. Div. 199, 51 N. Y. S. 685.

<sup>16</sup> *Fambles v. State*, 97 Ga. 625, 25 S. E. 365; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Brown v. State*, 52 Tex. Crim. 267, 106 S. W. 368; *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218. But see *People v. Blevins*, 251 Ill. 381, Ann. Cas. 1912C 451, 96 N. E. 214, where it was held error to allow accused to be defended by two

young attorneys appointed by the court when three experienced lawyers represented the prosecution.

<sup>17</sup> See generally *Henry v. Blackburn*, 32 Ark. 445; *Jordon v. Giblin*, 12 Cal. 100; *Brown v. Early*, 2 Duv. (Ky.) 369; *Allen v. Brown*, 4 Met. (Ky.) 342; *Christy v. Garrity*, (Ky.) 22 S. W. 158; *Garvey v. State*, (Tex.) 88 S. W. 873.

<sup>18</sup> Civ. Code La. 1900, art. 47.

suggestion has been made.<sup>19</sup> Under the practice in some jurisdictions, an *amicus curiæ* may be appointed by the court to aid in the performance of certain labors and examinations which are necessary to guide the court to a proper conclusion upon matters pending before it. In such cases an *amicus curiæ* is an officer of court for the purposes of his appointment, and may be compensated for his services.<sup>20</sup>

**§ 90. Status of Amici Curiae.** — An attorney may be heard, or not, as *amicus curiæ*, in the discretion of the court, concerning a proceeding in which he is not counsel.<sup>1</sup>

An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it.<sup>2</sup> Should the court so desire, it may, of course, request an attorney to appear before it as *amicus curiæ*.<sup>3</sup> The office of a friend of the court is restricted to making suggestions as to questions apparent upon the record, or matters of practice presenting themselves for determi-

<sup>19</sup> Birmingham Loan, etc. Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 49 Am. St. Rep. 45; Hamlin v. Particular Baptist Meeting House, 103 Me. 343, 69 Atl. 315; Taft v. Northern Transp. Co., 56 N. H. 414; Com. v. Collom, 1 Pa. Super. Ct. 542.

<sup>20</sup> In re St. Louis Institute, 27 Mo. App. 633.

Under Code Ia., § 325, providing that proceedings to remove an attorney may be commenced by direction of the court, who must direct some attorney to draw up the accusation, an attorney appointed to prosecute disbarment proceedings may recover from the county a reasonable compensation for his services though there is no statutory provision for compensation. Hyatt v. Hamilton County, 121 Ia. 292, 96 N. W. 855, 100 Am. St. Rep. 354, 63 L.R.A. 614, reversing 90 N. W. 508.

Where a judge, acting under the provisions of the code, appoints an attorney to see that ex parte proceedings for a divorce are being conducted upon legal grounds, the judge has no power to order the payment of such attorney's fees. Creamer v. Creamer, 36 Ga. 618.

<sup>1</sup> Farmer's Union Ditch Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 Pac. 1042; Little v. Thompson, 24 Ind. 146; per Lamm, J. in Ex p. Brockman, 233 Mo. 135, 134 S. W. 977; State v. Jefferson Iron Co., 60 Tex. 312; Ex p. Yeager, 11 Gratt. (Va.) 655.

<sup>2</sup> Birmingham Loan, etc. Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 So. 945, 49 Am. St. Rep. 45; Martin v. Tapley, 119 Mass. 116.

<sup>3</sup> Ex p. Randolph, 2 Brock. 461, 20 Fed. Cas. No. 11,558; In re St. Louis, etc., Science, 27 Mo. App. 633; In re Mumma, 2 Pa. Dist. Ct. 592.

nation in the course of proceedings in open court.<sup>4</sup> But the court can only do that which it could have done without such advice or aid.<sup>5</sup>

It is within the power of the court to listen to the representations, and to hear the evidence, of those appearing in a cause as *amici curiæ* claiming that such cause is a collusive or fictitious proceeding.<sup>6</sup> So the court may institute an inquiry at the suggestion of its *amicus curiæ*, for the purpose of determining whether it has jurisdiction over the person of a party necessary to enable it to render a judgment by default,<sup>7</sup> or dismiss an action for want of prosecution,<sup>8</sup> or set aside letters of administration which have been erroneously issued.<sup>9</sup> So *amici curiæ* may be allowed to file

<sup>4</sup> *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903; see also *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815.

If a judge be doubtful or mistaken as to a matter of law, a stander-by may inform the court, as *amicus curiæ*. *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815.

A suggestion to the court that one whose trial is about to commence has not pleaded formally to the information, is a proper suggestion to be made by any member of the bar as *amicus curiæ*. *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257.

Counsel, as *amicus curiæ*, may remind the court of a rule which it is in danger of violating, and then it is for the court to take such action as it may think proper to do. *Taft v. Northern Transp. Co.* 56 N. H. 414.

<sup>5</sup> *Andrews v. Beck*, 23 Tex. 455; *Moseby v. Burrow*, 52 Tex. 396; *State v. Jefferson Iron Co.*, 60 Tex. 312.

<sup>6</sup> *Sampson v. Highway Com'rs*, 115 Ill. App. 443; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815; *Kelly v. New York*

*City R. Co.*, 102 N. Y. S. 741; *State v. Wilson*, 2 Lea (Tenn.) 204; *Stearns v. Stearns*, 10 Vt. 540.

Attorneys are officers of the court, and it is not only their right, but their duty, if they know or have reason to believe that the time of the court is being taken up by the trial of a feigned issue, to inform the judge of the fact, whether of counsel in the case or not. *Ward v. Alsop*, 100 Tenn. 619, 46 S. W. 573.

<sup>7</sup> *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446. See also *Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903.

The appearance of a defendant's attorney, as *amicus curiæ*, to object to the sufficiency of service of a writ, is not an appearance of such company. *International, etc., R. Co. v. Moore*, (Tex.) 32 S. W. 379.

<sup>8</sup> *Tomkin v. Harris*, 90 Cal. 201, 27 Pac. 202.

<sup>9</sup> *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477; *Mallory v. Burlington, etc., R. Co.*, 53 Kan. 557, 36 Pac. 1059; *Gasque v. Moody*, 12 Smed. & M. (Miss.) 153.

briefs,<sup>10</sup> but an attorney will not be permitted to enter a cause as *amicus curiæ*, and file a brief and petition for rehearing, where the attorneys regularly in the cause neither request nor consent to such interference.<sup>11</sup> Where *amici curiæ* are heard, the parties immediately interested, if not present, should be informed of such interference, and given time to resist or explain, by affidavit or otherwise.<sup>12</sup>

**§ 91. Power and Functions.**—An *amicus curiæ* may examine witnesses and make an argument in the cause wherein he has been appointed,<sup>13</sup> though he has no right to take an exception to the ruling of the court.<sup>14</sup> Nor may *amici curiæ* move to dis-

<sup>10</sup> *Robinson v. Lee*, 122 Fed. 1010.

Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. It is entirely within the discretion of the court to allow it in any case when justified by the circumstances. *Northern Securities Co. v. U. S.*, 191 U. S. 555, 24 S. Ct. 119, 48 U. S. (L. ed.) 299 (filing not allowed in this case).

<sup>11</sup> *Charleston v. Cadle*, 167 Ill. 647, 49 N. E. 192.

See also *Nauer v. Thomas*, 13 Allen (Mass.) 572, wherein it was said: "When competent counsel retained in a cause were present in court prepared to argue it, the court declined to hear other counsel, not retained in the cause before the court, or in any other cause in which similar questions would arise; but who expected to have a similar cause thereafter. . . . Nor can he be heard as *amicus curiæ*, where the parties are attended by competent

counsel, and the court do not ask for further argument."

<sup>12</sup> *In re Guernsey*, 21 Ill. 443.

<sup>13</sup> *In re Arszman*, 40 Ind. App. 218, 81 N. E. 680.

<sup>14</sup> *Alabama*.—*Birmingham L. & A. Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

*Indiana*.—*Campbell v. Swasey*, 12 Ind. 70; *Hust v. Conn*, 12 Ind. 257; *Buchanan v. Beard*, 13 Ind. 471; *Darlington v. Warner*, 14 Ind. 449; *Knight v. Low*, 15 Ind. 374; *Morehouse v. Potter*, 15 Ind. 477; *Conrad v. Johnson*, 20 Ind. 421; *Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702; *In re Arszman*, 40 Ind. App. 218, 81 N. E. 680.

*Massachusetts*.—*Martin v. Tapley*, 119 Mass. 116.

*Pennsylvania*.—*In re Stitzel*, 221 Pa. St. 227, 70 Atl. 749, 18 L.R.A. (N.S.) 613.

*Texas*.—*Bass v. Fontleroy*, 11 Tex. 698; *Chicago, etc., R. Co. v. Anderson*, 130 S. W. 182.

A motion made by an attorney, as a friend of the court, cannot be treated as the exception of the parties. *Andrews v. Beck*, 23 Tex. 455.

miss a cause;<sup>15</sup> they may, of course, suggest dismissal, and it is then discretionary with the court to stay the proceedings, make due inquiry, and, if the facts warrant the suggestion, dismiss the case.<sup>16</sup>

It is not ordinarily the function of the *amicus curiæ* to take upon himself the management of a cause.<sup>17</sup> He has no control over the suit, and no right to institute proceedings thereon;<sup>18</sup> he cannot assume the function of a party to the action;<sup>19</sup> thus he cannot file a demurrer,<sup>20</sup> or bring the case from one court to another by appeal or writ of error.<sup>1</sup> In some instances, however, *amici curiæ* have been appointed to render services on appeal; thus it has been held that on appeal from an order of the county commis-

<sup>15</sup> *Piggott v. Kirkpatrick*, 31 Ind. 261; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815.

<sup>16</sup> *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815.

<sup>17</sup> *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315; *Taft v. Northern Transp. Co.*, 56 N. H. 414; *Com. v. Collom*, 1 Pa. Super. Ct. 542.

<sup>18</sup> *Birmingham Loan, etc., Co. v. Anniston First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45; *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315.

<sup>19</sup> *In re Pina*, 112 Cal. 14, 44 Pac. 332; *In re McClellan*, 27 S. D. 109, Ann. Cas. 1913C 1029, 129 N. W. 1037.

<sup>20</sup> *Ex p. Henderson*, 84 Ala. 36, 4 So. 284; *Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315.

<sup>1</sup> *Alabama*.—*Birmingham Loan, etc., Co. v. Anniston First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45.

*California*.—*In re Pina*, 112 Cal. 14, 44 Pac. 332.

*Indiana*.—*Irwin v. Armuth*, 129 Ind. 340, 28 N. E. 702.

*Maine*.—*Hamlin v. Particular Baptist Meeting House*, 103 Me. 343, 69 Atl. 315.

*Massachusetts*.—*Martin v. Tapley*, 119 Mass. 116.

*Mississippi*.—*Miller v. Keith*, 26 Miss. 166.

*New York*.—*E. B. v. E. C. B.*, 8 Abb. Pr. 44, 28 Barb. 299.

*South Dakota*.—*In re McClellan*, 27 S. D. 109, Ann. Cas. 1913C 1029, 129 N. W. 1037.

*Texas*.—*Southern R. Co. v. Locke*, 84 S. W. 1069.

*Virginia*.—*Dunlop v. Com.*, 2 Call 284; *Sayre v. Grymes*, 1 Hen. & M. 404.

*In Miller v. Keith*, 26 Miss. 166, it was said: "We are of opinion that the court erred in not following the suggestions thrown out by the appellant, as *amicus curiæ*, yet this error can only be corrected upon the application of a party who can profit by its correction; and not upon the application of a stranger, or one whose advice has not been properly heeded."

sioners refusing a statutory application for a liquor license, the court may appoint some person to appear and defend the proceeding as an *amicus curiæ*.<sup>3</sup> On the other hand, in declining to follow the suggestions of *amici curiæ*, the California Supreme Court said: "We have not acted upon the suggestion made by counsel appearing as *amici curiæ*, for a diminution of the record, for the reason, in the first place, that we do not deem the matters suggested material, and, in the next place, we do not recognize any right in counsel appearing *amicus* to interfere with or control the condition of the record in such an instance. They have not the rights in that regard of an adversary in the litigation. Nor are the liberties of counsel thus appearing at all enlarged in this instance because the court below assumed to appoint them as *amici curiæ* to represent it on the appeal. The court is not a party to the appeal, and we know of no authority for the making of such appointment in any case. To the extent to which they are entitled to be heard they have the same rights without such appointment as with it."<sup>4</sup> An *amicus curiæ* cannot move to quash an inquisition of escheat.<sup>5</sup> Associate judges cannot call a member of the bar, as *amicus curiæ*, to the bench to advise them how to conduct a trial, and how to decide questions of law that may arise, and thus take the place of the law judge.<sup>6</sup>

<sup>3</sup> In re Arszman, 40 Ind. App. 218, 81 N. E. 680; State v. Gorman, 171 Ind. 58, 85 N. E. 763.

<sup>4</sup> In re Pina, 112 Cal. 14, 44 Pac. 332.

<sup>5</sup> Dunlop v. Com., 2 Call (Va.) 284.

<sup>6</sup> Com. v. Collom, 1 Pa. Super. Ct. 542.



## CHAPTER VI.

### PRIVILEGED COMMUNICATIONS.

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#### In General.

§ 92. General Rule. — The general rule is that all confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are privileged from disclosure,<sup>1</sup> even for

<sup>1</sup> *United States*.—*Chirac v. Reinicker*, 11 Wheat. 280, 6 U. S. (L. ed.) 474; *Murray v. Dowling*, 1 Cranch (C. C.) 151, 17 Fed. Cas. No. 9,959; *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

*Alabama*.—*Parish v. Gates*, 29 Ala. 254.

*Arkansas*.—*Andrews v. Simms*, 33 Ark. 771; *Fox v. Spears*, 78 Ark. 71, 93 S. W. 560.

*California*.—*Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. 364, 778.

*Delaware*.—*Bush v. McComb*, 2 Houst. 546.

*District of Columbia*.—*Elliott v. U. S.*, 23 App. Cas. 456.

*Georgia*.—*Riley v. Johnston*, 13 Ga. 260; *Causey v. Wiley*, 27 Ga. 444; *Raeffe v. Moore*, 58 Ga. 94; *Young v. State*, 65 Ga. 525; *Philman v. Marshall*, 103 Ga. 82, 29 S. E. 598; *Rylee v. Statham Bank*, 7 Ga. App. 489, 67 S. E. 383.

*Idaho*.—*State v. Perry*, 4 Idaho 224, 38 Pac. 655.

*Illinois*.—*Granger v. Warrington*, 8 Ill. 299; *Thorp v. Goewey*, 85 Ill. 611; *Oliver v. McDowell*, 100 Ill. App. 45; *Holmes v. Horn*, 120 Ill. App. 359.

*Indiana*.—*Jenkinson v. State*, 5 Blackf. 465; *Reed v. Smith*, 2 Ind. 160.

the purposes of the administration of justice,<sup>3</sup> and regardless of the manner in which it is sought to put them in evidence,<sup>3</sup> unless the client himself consents to such disclosure or otherwise waives his privilege.<sup>4</sup> Whatever facts, therefore, are communicated by a client to his counsel, solely on account of the relation, such counsel are not at liberty, even if they wish, to disclose;<sup>5</sup> nor can the

*Iowa*.—*Singer v. Sheldon*, 56 Ia. 354, 9 N. W. 298.

*Kansas*.—*Wilkins v. Moore*, 20 Kan. 538; *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537.

*Kentucky*.—*Carter v. West*, 93 Ky. 211, 19 S. W. 592.

*Louisiana*.—*State v. Hazleton*, 15 La. Ann. 72; *Holmes v. Barbin*, 15 La. Ann. 553; *Morris v. Cain*, 39 La. Ann. 712, 1 So. 797, 2 So. 418; *State v. Gosey*, 111 La. 616, 35 So. 786.

*Maine*.—*McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

*Maryland*.—*Ghew v. Farmers' Bank*, 2 Md. Ch. 231; *Lowe v. Lowe*, 111 Md. 113, 73 Atl. 878.

*Michigan*.—*Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, 7 Detroit Leg. N. 367.

*Missouri*.—*Ingerham v. Weatherman*, 79 Mo. App. 480.

*Montana*.—*Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793; *Smith v. Caldwell*, 22 Mont. 331, 56 Pac. 590.

*Nebraska*.—*Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962; *Spaulding v. State*, 61 Neb. 289, 85 N. W. 80.

*New York*.—*Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *McClure v. Goodenough*, 19 Civ. Pro. 191, 12 N. Y. S. 459; *Matter of Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. S. 1059; *Downey v. Owen*, 98 App. Div. 411, 90 N. Y. S. 280.

*North Carolina*.—*Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Ohio*.—*Rogers v. Dare*, Wright 136.

*Oklahoma*.—*Brown v. State*, 132 Pac. 359.

*Texas*.—*Walker v. State*, 19 Tex. App. 176; *Dyer v. McWhirter*, 51 Tex. Civ. App. 200, 111 S. W. 1053.

*Utah*.—*State v. Snowden*, 23 Utah 318, 65 Pac. 479.

*Vermont*.—*Maxham v. Place*, 46 Vt. 434; *Hick v. Blanchard*, 60 Vt. 673, 15 Atl. 401.

*Virginia*.—*Parker v. Carter*, 4 Munf. 273, 6 Am. Dec. 513.

*West Virginia*.—*State v. Douglass*, 20 W. Va. 770.

*Wisconsin*.—*Dudley v. Beck*, 3 Wis. 274; *Dickson v. Bills*, 144 Wis. 171, 128 N. W. 868.

See also *infra*, § 98 et seq.

<sup>2</sup> *Bush v. McComb*, 2 Houst. (Del.) 546.

<sup>3</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

*Cross-Examination*.—A privileged communication cannot be drawn from a witness on cross-examination. *Jahnke v. State*, 68 Neb. 182, 104 N. W. 154, *reversing* 68 Neb. 154, 94 N. W. 158; *Ft. Worth, etc., R. Co. v. Lock*, 30 Tex. Civ. App. 426, 70 S. W. 456; *Herring v. State*, (Tex.) 42 S. W. 301.

<sup>4</sup> See *infra*, § 128 et seq.

<sup>5</sup> *Chirac v. Reinicker*, 11 Wheat. 280, 6 U. S. (L. ed.) 474; *Jenkinson v. State*, 5 Blackf. (Ind.) 465; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

client be compelled to disclose them,<sup>6</sup> notwithstanding a statute permitting a party to an action to be examined in his own behalf,<sup>7</sup> or at the instance of the adverse party.<sup>8</sup>

It is not material whether the evidence relate to what was said by the attorney or what was said by the client, in their private conversation on the business in which the attorney was professionally employed; the statements of each to the other, in such cases, must be considered as privileged communications.<sup>9</sup>

The just application of this rule, from a very early period in the history of the law, has been upheld by the courts as of supreme importance in the administration of justice; and it has wisely been left untouched by any of the statutes in modern times which have so liberally removed restrictions from the rules of evidence;<sup>10</sup> indeed, as shown by the following section, the rule has been substantially confirmed by legislative action in many jurisdictions.

**§ 93. Effect of Statutory Provisions.**—In some states the rule forbidding the disclosure of confidential communications between attorney and client has been embodied in statutory enact-

<sup>6</sup> *Birmingham R., etc., Co. v. Wildman*, 119 Ala. 547, 24 So. 548.

*Client as Witness.*—Communications made in consultation by a client with his attorney, are privileged and protected from inquiry when the client is a witness as well as when the attorney is a witness. *Bigler v. Reyher*, 43 Ind. 112.

While a party who offers himself as a witness cannot refuse to answer pertinent questions on the ground that he has communicated to his attorney the matters inquired about, yet he cannot be compelled to state whether or not he has communicated certain facts to his attorney, or given him certain instructions. *Birmingham R., etc., Co. v. Wildman*, 119 Ala. 547, 24 So. 548.

<sup>7</sup> *Pulford's Appeal*, 48 Conn. 247;

*Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495, reversing 21 Hun 344.

<sup>8</sup> *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495, reversing 21 Hun 344.

<sup>9</sup> *Jenkinson v. State*, 5 Blackf. (Ind.) 465.

<sup>10</sup> *Andrews v. Simms*, 33 Ark. 771; *Oliver v. Cameron, MacArthur & M.* (D. C.) 237.

*Rule Well Settled.*—There is, perhaps, no principle of law which rests on a sounder basis, or which is supported by a more uniform chain of adjudication, than that which holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications. *Parish v. Gates*, 29 Ala. 254; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

ments,<sup>11</sup> which, as a rule, have been held to be merely declaratory

<sup>11</sup> *Arkansas*.—*Andrews v. Simms*, 33 Ark. 771; *Fox v. Spears*, 78 Ark. 71, 93 S. W. 560.

*California*.—*Hardy v. Martin*, 150 Cal. 341, 89 Pac. 111; *Matter of Higgins*, 156 Cal. 257, 104 Pac. 6.

*Colorado*.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

*Dakota*.—*O'Neill v. Murry*, 6 Dak. 107, 50 N. W. 619.

*Georgia*.—*Lewis v. State*, 91 Ga. 168, 10 S. E. 986; *Harkless v. Smith*, 115 Ga. 350, 41 S. E. 634.

*Indiana*.—*State v. VanBuskirk*, 59 Ind. 384; *George v. Hurst*, 31 Ind. App. 660, 68 N. E. 1031.

*Iowa*.—*Lauer v. Banning*, 140 Ia. 319, 118 N. W. 446; *Stoddard v. Kendall*, 140 Ia. 688, 119 N. W. 138.

*Kentucky*.—*Denunzio v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715.

*Louisiana*.—*Shanghnessy v. Fogg*, 15 La. Ann. 330.

*Minnesota*.—*Hilary v. Minneapolis St. R. Co.*, 104 Minn. 432, 116 N. W. 933.

*Missouri*.—*State v. Dawson*, 90 Mo. 149, 1 S. W. 827. See also *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286 (decided under the Missouri statute).

*Montana*.—*Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795.

*Nebraska*.—*Sloan v. Wherry*, 51 Neb. 703, 71 N. W. 744.

*North Carolina*.—N. C. Rev. 1905, § 1020; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Ohio*.—*Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125.

*South Dakota*.—*Austin, etc., Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445.

*Texas*.—*Menefee v. State*, 149 S. W. 138.

*Wisconsin*.—*Selden v. State*, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

The *Georgia* Civil Code, § 5198, declares that certain admissions and communications are, from public policy, to be excluded as evidence. Among these are communications between attorney or counsel and client. Section 5271 of the same code gives the rule more explicitly. Its provisions are, that "no attorney shall be competent or compellable to testify in any court, . . . for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relation as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner." Section 5199 still further enlarges the rule relating to privileged communications, and declares that "communications to any attorney, or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof, shall never be heard by the court." *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356.

*Idaho*.—Under the provisions of subdivision 2, § 5958, Rev. St. 1887, an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employ-

of the common law,<sup>12</sup> and subject to the same construction.<sup>13</sup> In one instance where the statutory rules of evidence were held inapplicable to criminal cases, the common-law rule as to privileged communications was applied.<sup>14</sup> In New York, however, the statute has extended the common-law prohibition in some respects,<sup>15</sup> particularly as to the waiver thereof,<sup>16</sup> and as to the attorney's competency as a witness with respect to the preparation and execution of wills.<sup>17</sup> Local statutes of this character, it seems, are not applicable when the question of privilege arises in the United States courts.<sup>18</sup>

**§ 94. Origin and Reason of Rule.**—The rule as to privileged communications was applied, apparently for the first time,

ment. In *re* Niday, 15 Idaho 559, 98 Pac. 845.

*Missouri.*—Section 8925 of the Revised Statutes of Missouri means that the intercourse between client and attorney should be protected by profound secrecy, and that under no guise or subtlety should an evasion of the rule be permitted. *Henry v. Buddecke*, 81 Mo. App. 360.

*New York.*—Section 835 of the Code of Civil Procedure provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

<sup>12</sup> *California.*—*Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

*Georgia.*—*O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 262; *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356.

*Nebraska.*—*Brady v. State*, 39 Neb. 529, 58 N. W. 161.

*Oklahoma.*—*Evans v. State*, 5 Okla. Crim. 643, 115 Pac. 809, 34 L.R.A. (N.S.) 577.

*Oregon.*—*State v. Gleason*, 19 Ore. 159, 23 Pac. 817.

*Utah.*—In *re* Young, 33 Utah 382, 14 Ann. Cas. 596, 94 Pac. 731, 126 Am. St. Rep. 843, 17 L.R.A. (N.S.) 108.

*Washington.*—*Hartness v. Brown*, 21 Wash. 655, 56 Pac. 491; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393.

*Wisconsin.*—In *re* Downing, 118 Wis. 581, 95 N. W. 876.

<sup>13</sup> *Keck v. Bode*, 13 Ohio Cir. Dec. 413.

<sup>14</sup> *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125.

<sup>15</sup> Section 836 N. Y. Code Civ. Pro.; In *re* Cunnion, 201 N. Y. 123, Ann. Cas. 1912 A 834, 94 N. E. 648, *affirming* 135 App. Div. 864, 120 N. Y. S. 266.

<sup>16</sup> See *infra*, § 129.

<sup>17</sup> See *infra*, § 126.

<sup>18</sup> *Connecticut Mut. L. Ins. Co. v.*

in the case of *Berd v. Lovelace*,<sup>19</sup> and for three centuries at least it has been steadily upheld by the courts on the ground that, for the proper administration of the law, the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance, should upon all occasions be inviolable,<sup>20</sup> because greater mischiefs would probably result from requiring or permitting its disclosure than from wholly rejecting evidence thereof.<sup>1</sup> The rule is not one of mere professional conduct.<sup>2</sup>

The idea which seems to be involved in its establishment is not that of mere secrecy. It is not that the client has imparted to the attorney information about a matter which is to be concealed from the public. But it is founded on altogether a different principle. Having respect solely to the free and unembarrassed administration of justice, and to the security of all men in the enjoyment of their civil rights, no man is under a legal obligation to disclose facts or circumstances which would render questionable his demand for a particular right, or impair his defense to another's demand. Originally, suitors and defendants appeared personally

*Schaefer*, 94 U. S. 457, 24 U. S. (L. ed.) 251; *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

<sup>19</sup> *Cary* (Eng.) 88.

<sup>20</sup> *United States*.—*Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286; *In re Ruos*, 159 Fed. 252.

*Alabama*.—*Parish v. Gates*, 29 Ala. 254.

*Connecticut*.—*Goddard v. Gardner*, 28 Conn. 172.

*Delaware*.—*Bush v. McComb*, 2 Houst. 546.

*Georgia*.—*Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356.

*Idaho*.—*In re Niday*, 15 Idaho 559, 98 Pac. 845.

*Kansas*.—*Michael v. Matson*, 81 Kan. 360, 105 Pac. 537.

*Maine*.—*Wade v. Ridley*, 87 Me. 308, 32 Atl. 975.

*Massachusetts*.—*Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Barnes v. Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L.R.A. 188.

*Minnesota*.—*Struckmeyer v. Lamb*, 75 Minn. 366, 77 N. W. 987.

*Missouri*.—*State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

*Pennsylvania*.—*Heister v. Davis*, 3 Yeates, 4; *In re Matthews*, 5 Pa. L. J. Rep. 149, 4 Am. L. J. 356, 1 Phila. 292, 9 Leg. Int. 11.

*Texas*.—*McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

*Vermont*.—*Dixon v. Parmelee*, 2 Vt. 185.

<sup>1</sup> *State v. Perry*, 4 Idaho 224, 38 Pac. 655; *State v. Douglass*, 20 W. Va. 770.

<sup>2</sup> *Liggett v. Glenn*, 51 Fed. 381, 4

before the tribunal which interpreted and administered the law. Subsequently, however, when the application of legal principles and the forms of procedure became more complicated and intricate, the services of persons having knowledge of the one and skill in the other came into demand, and to fully protect the rights of parties litigant the procurement of the services of persons skilled in the law became universal. No man being compelled himself to disclose the weakness of his case, it followed, almost as a necessary consequence, that the person who represented him, and presented that case, could not do so. If it were otherwise, the free administration of justice would be restricted, and the ascertainment and enforcement of rights endangered. Therefore, when, in order to obtain the measure of his rights, the client resorts to a representative who can better judge the merits of his case, and discloses to him the facts upon which the ascertainment of his rights must depend, the law puts a seal upon the lips of his counsel just as effectually as the interest of the client placed a ban upon his own disclosure.<sup>3</sup> The rule undoubtedly confers a right upon the

U. S. App. 438, 2 C. C. A. 286; U. S. r. Lee, 107 Fed. 702.

<sup>3</sup> Stone v. Minter, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356; Rochester City Bank v. Suydam, 5 How. Pr. (N. Y.) 254; McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611.

The principle of privileged communications was ably considered by Lord Brougham in *Greenough v. Gaskell*, 1 Myl. & K. (Eng.) 98. He said: "The foundation of the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and

to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of courts, and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case." *Blackburn v. Crawford*, 3 Wall. 175, 18 U. S. (L. ed.) 186.

It is obvious that there would be an end to all confidence between the client and his attorney, if the latter was at liberty, or compellable, to disclose the facts of which he had thus obtained possession. *Goddard v. Gardner*, 28 Conn. 172.



client,<sup>4</sup> which he alone is authorized to waive;<sup>5</sup> and it is supported by several authorities on the broad ground of public policy.<sup>6</sup>

It is an attorney's right to guard the secrets of his client where such secrets do not involve an actual or intended breach of the law on the part of the client, and hence complicity by the attorney therein, and the court should support him in such duty.<sup>7</sup>

**§ 95. Construction of Rule.** — The rule excluding confidential communications between attorney and client is to be construed with reference to its policy; and while it ought not to be weakened by a narrow construction, neither should it be extended beyond the limits of the reason upon which it is based.<sup>8</sup>

The object of the rule seems plainly to require that the entire professional intercourse between attorney and client, whatever it may have been, shall be protected by profound secrecy. *Bush v. McComb*, 2 Houst. (Del.) 546.

<sup>4</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

<sup>5</sup> See *infra*, § 128.

<sup>6</sup> *White v. State*, 86 Ala. 69, 5 So. 674; *Andrews v. Simms*, 33 Ark. 771; *State v. Barrows*, 52 Conn. 323; *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. 364, 778; *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *Sargent v. Hampden*, 38 Me. 581.

It is recognized by the courts that the exclusion of evidence of professional communications as privileged, is founded upon the same great considerations of public policy which forbid the revelation on the witness stand of secrets of state; of the proceedings in the grand jury room; and of confidential intercourse between husband and wife. *Oliver v. Cameron, MacArthur & M.* (D. C.) 237.

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<sup>7</sup> *U. S. v. Lee*, 107 Fed. 702; *Sample v. Frost*, 10 Ia. 266.

<sup>8</sup> *Goddard v. Gardner*, 28 Conn. 172; *Pulford's Appeal*, 48 Conn. 247; *In re Huffman*, 132 Mo. App. 44, 111 S. W. 848.

*It is for the protection and security of clients that their attorneys-at-law or counsel are restrained from giving evidence of what they have had communicated and intrusted to them in that character; so that legal advice may be had at any time by every man who wishes it in regard to his case, whether it be bad or good, favorable or unfavorable to him, without the risk of being rendered liable to loss in any way, or to punishment, by means of what he may have disclosed or intrusted to his counsel. But where it is impossible that the rights or the interests of the client can be affected by the witness's giving evidence of what came to his knowledge by his having been counsel and acted at the time as attorney or counsel at law, the rule has no application whatever, because the reason of it does not exist.* *Hamilton v. Neel*, 7 Watts (Pa.) 517.

As it is in contravention to the general rules of law because of its tendency to suppress the truth, it has been quite generally held that the rule should receive a strict construction;<sup>9</sup> on the other hand, however, some courts favor a liberal construction on the theory that one consulting a lawyer should be encouraged to communicate all the facts without fear that his statements may possibly be used against him in the future.<sup>10</sup> It is true that the strict enforcement of the rule may, in some cases, operate to the exclusion of truth; but that does not justify the breaking down of a great principle of protection founded in wisdom and public policy, and necessary to be observed in the administration of an enlightened system of jurisprudence.<sup>11</sup> Truth, like all other good things, may be loved unwisely, pursued too keenly, and may cost too much.<sup>12</sup>

*A statute excluding an attorney from being examined without the consent of his client as to any communication made by the client to him, or his advice given thereon in the course of professional employment, should be fairly construed and applied according to the plain import of its terms.* *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

\* *Satterlee v. Bliss*, 36 Cal. 489; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Granger v. Warrington*, 8 Ill. 299; *Goltra v. Wolcott*, 14 Ill. 89; *McLaughlin v. Gilmore*, 1 Ill. App. 563; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *In re Matthews*, 5 Pa. L. J. Rep. 149, 4 Am. L. J. 356, 1 Phila. 292, 9 Lg. Int. 11.

<sup>10</sup> *Wade v. Ridley*, 87 Me. 368, 32 Atl. 975; *Kitz v. Buckmaster*, 45 App. Div. 283, 61 N. Y. S. 64; *Orman v. State*, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 622.

The United States Supreme Court, in the case of *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 458, 24 U. S. (L. ed.) 251, announces, we believe, the general sentiment of the profession, when it expresses the hope that the rule will remain undisturbed by any future legislation. For as the court in that case proceeds to say: "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Oliver v. Cameron, MacArthur & M. (D. C.)* 237.

<sup>11</sup> *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456.

<sup>12</sup> *Pearse v. Pearse*, 11 Jur. (Eng.) 52; *State v. Douglass*, 20 W. Va. 770.

§ 96. **Determining whether Privilege Exists.** — Whether a communication by a client to his attorney was made in confidence, is a question of fact to be disposed of by the court.<sup>13</sup> It is requisite, in every instance, that it shall be judicially determined whether the particular communication in question is really privileged; and, in order that such determination may be advisedly made, it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances.<sup>14</sup> The general rule is that there is no presumption of privilege,<sup>15</sup> although its allowance in a clear case may be founded upon the voluntary statement of the attorney that his knowledge of the fact, concerning which he is requested to testify, was acquired in professional confidence.<sup>16</sup> But the witness is not entitled to decide the question for himself.<sup>17</sup> The province of the court cannot be thus usurped.

<sup>13</sup> *Hager v. Shindler*, 29 Cal. 47; *Hull v. Lyon*, 27 Mo. 570; *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793; *Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795; *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Depends on Circumstances.*—As it is not every communication made by a client to his attorney which cannot be divulged by the latter as a witness, it necessarily follows that whether the fact was communicated professionally or not must depend upon the circumstances of the case, considered in connection with the fact disclosed. *Brazier v. Fortune*, 10 Ala. 516.

*Referee Should Decide Question for Himself.*—Where the question of privileged communication arises before a referee, he should decide the point himself in the first instance, instead of turning the matter over to the court. It will be time enough to certify the question when he is asked to do so in a proper manner. *In re Ruos*, 159 Fed. 252.

<sup>14</sup> *People's Bank v. Brown*, 112 Fed. 654, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; *In re Ruos*, 159 Fed. 252.

<sup>15</sup> *People's Bank v. Brown*, 112 Fed. 654, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; *In re Ruos*, 159 Fed. 252.

<sup>16</sup> *People's Bank v. Brown*, 112 Fed. 654, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; *In re Ruos*, 159 Fed. 252.

*Allowing Attorney to Determine Question of Privilege.*—The fact that the court allowed an attorney to determine whether he would testify or not is not a ground of complaint where the result was not affected by it. *Maxham v. Place*, 46 Vt. 434.

<sup>17</sup> *In re Ruos*, 159 Fed. 252.

*An attorney is not to judge what is, or is not, privileged from disclosure.* He must state the occasion and circumstances of the act or communication, and the general nature of the matter alleged to be privileged, so that the court may decide whether he shall be compelled to testify or not. *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

It is sometimes a question of great

If it could be it is obvious that the rule under consideration, which is designed to promote the administration of justice, might readily be used for its obstruction, and become in consequence too pernicious to be tolerated.<sup>18</sup> The privileged character of the communication must appear;<sup>19</sup> the mere fact that the person offered as a witness is an attorney at law does not render it improper for him to relate statements or communications made to him by another; nor is the fact that the person whose statements are sought to be proven was the client of a particular lawyer at the time the communication was made, sufficient in itself to exclude the testimony of the latter concerning it.<sup>20</sup> It is the business of the party claiming the benefit of exemption from the general rule, which compels all to disclose the truth, to show that the particular instance is privileged; failing to do this, it must be taken against him.<sup>1</sup> In some

delicacy for counsel to determine between his obligations to the public, and his solemn and sworn duty to his client; in such cases the counsel can seldom form an impartial judgment, and if mistaken he is not to be harshly or severely dealt with. His duty is to submit the question to the court, upon which the law has cast the duty of deciding it. *Ex p. Maulsby*, 13 Md. 625.

*The refusal of a witness to produce papers*, acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, is assuming the right of determining for himself the question of privilege, which is not his province, but that of the court; and such refusal is a contempt. *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

*Denial of Relation by Attorney.*—Although an attorney, when called as a witness as to communications made to him, disclaims that he was acting in a professional capacity, the question is none the less one for the court to determine from the facts.

*Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, reversing 15 Hun 26.

<sup>18</sup> *In re Ruos*, 159 Fed. 252.

<sup>19</sup> *State v. Stafford*, 145 Ia. 285, 123 N. W. 167.

<sup>20</sup> *Stoddard v. Kendall*, 140 Ia. 688, 119 N. W. 138; *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

Where a bill of exceptions, alleged by a defendant, stated that at the trial of the case in a lower court the plaintiff produced, as a witness, his counsel, who testified to transactions between the parties, it was held that it could not be assumed, in favor of the excepting party, to mean that the counsel testified to conversations between himself and client. *Blount v. Kimpton*, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554.

<sup>1</sup> *Connecticut*.—*Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

*Idaho*.—*In re Niday*, 15 Idaho 559, 98 Pac. 845.

*Illinois*.—*Chillicothe Ferry, etc., Co. v. Jameson*, 48 Ill. 281; *McLaughlin v. Gilmore*, 1 Ill. App. 563.

states, however, it has been held that all communications between attorney and client should be deemed confidential; but this presumption may be rebutted.<sup>3</sup>

§ 97. **Enjoining Secrecy.** — The law does not regard it as necessary for the protection of the client that his communications should be made to his attorney under any particular circumstances or injunctions of secrecy; it is sufficient that the relation of client and attorney subsisted between them to throw around the proceeding an impenetrable veil of secrecy.<sup>4</sup> The rule is not restricted to such matters as may have been communicated in special confidence; nor is it necessary that the client be apprised of his rights thereunder.<sup>5</sup>

Attorneys and clients cannot broaden the scope of the privilege, although they may narrow it even to the point of waiving it altogether; and, therefore, it is unimportant that the client exacts from the attorney a promise that he will keep secret whatever communications should be made. While that might be a reason for the witness refusing to answer without a compulsory order of the court, it would not and could not of itself, without the aid of the law, protect a communication.<sup>6</sup>

### *Application of Rule.*

§ 98. **Generally.** — While the general rule respecting privileged communications between attorney and client is well under-

*Iowa.*—Stoddard v. Kendall, 140 Ia. 688, 119 N. W. 138.

*Pennsylvania.*—Beeson v. Beeson, 9 Pa. St. 279; Lyon v. Lyon, 197 Pa. St. 212, 47 Atl. 193. Compare Moore v. Bray, 10 Pa. St. 519.

*Utah.*—State v. Snowden, 23 Utah 318, 65 Pac. 479.

*Vermont.*—Earle v. Grout, 46 Vt. 113.

<sup>3</sup> Hager v. Shindler, 29 Cal. 47; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Borum v. Fouts, 15 Ind. 50.

The burden is upon the party seeking to suppress the evidence, to show

that it is within the terms of the statute relating to confidential and privileged communications. Carroll v. Sprague, 59 Cal. 655; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

<sup>4</sup> Wheeler v. Hill, 16 Me. 329; McLellan v. Longfellow, 32 Me. 494, 54 Am. Dec. 599; Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

<sup>5</sup> Crawford v. McKissack, 1 Port. (Ala.) 433.

<sup>6</sup> McLellan v. Longfellow, 32 Me. 494, 54 Am. Dec. 599.

<sup>6</sup> U. S. v. Lee, 107 Fed. 702.

stood, its application frequently presents questions of some difficulty, which, of course, must be decided in accordance with the facts appearing in the cause.<sup>7</sup>

As a general rule it may be said that the privilege extends to communications made to a legal adviser, duly qualified as such, and employed and acting in that capacity, where the object of the party is to obtain a more exact and complete knowledge of the law affecting his rights, obligations or duties, relative to the subject-matter to which such communications relate;<sup>8</sup> or, in other words, whenever the communication made relates to a matter so connected with the employment as attorney or counsel as to afford a presumption that it was the ground of the address by the client, then it is privileged from disclosure.<sup>9</sup>

Many statements of fact are doubtless made by clients to counsel by reason of the confidential relation existing between them, which are never made the subject of consultation nor of advice on the part of counsel, nor the basis for professional action, but they are nevertheless privileged communications, because they owe their

<sup>7</sup> *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

<sup>8</sup> *United States*.—*Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

*Alabama*.—*Crawford v. McKissack*, 1 Port. 433; *Brazier v. Fortune*, 10 Ala. 516.

*District of Columbia*.—*Elliott v. U. S.*, 23 App. Cas. 456.

*Georgia*.—*Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165.

*Illinois*.—*Granger v. Warrington*, 8 Ill. 299.

*Maine*.—*McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599; *Sargent v. Hampden*, 38 Me. 581.

*Massachusetts*.—*Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *National Bank of Republic v. Delano*, 177 Mass. 362, 58 N. E. 1079, 83 Am. St. Rep. 281.

*New York*.—*Utica Bank v. Merse-reau*, 3 Barb. Ch. 528, 49 Am. Dec.

189; *Stuyvesant v. Peckham*, 3 Edw. 579; *Barry v. Coville*, 53 Hun 620, 7 N. Y. S. 36; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *reversing* 15 Hun 26.

*Texas*.—*McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

*Vermont*.—*Wetherbee v. Ezekiel*, 25 Vt. 47.

*West Virginia*.—*State v. Douglass*, 20 W. Va. 770.

*Wisconsin*.—*De Witt v. Perkins*, 22 Wis. 473.

<sup>9</sup> *Turquand v. Knight*, 2 M. & W. (Eng.) 98; *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *reversing* 15 Hun 26.

*Title to Property*.—An attorney cannot be compelled to disclose communications made to him by his client as to the nature, extent, or grounds of his title. *Chirac v. Rei-*

existence to the relation occupied by the parties when they were made.<sup>10</sup>

The materiality or importance of the communication is of no consequence.<sup>11</sup> A privileged communication cannot be admitted in evidence indirectly;<sup>12</sup> nor will the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify,

nicker, 11 Wheat. 280, 6 U. S. (L. ed.) 474.

So, also, communications made by the purchaser of real estate to an attorney whom he has employed to see that he gets a good title, and to prepare a deed, are within the rule. *Carter v. West*, 93 Ky. 211, 19 S. W. 592.

<sup>10</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

*Desultory Conversation.*—In a conversation, somewhat desultory, between client and attorney, it may not always be easy to determine the purpose for which certain communications were made. When, however, they appear to have been made while the parties were manifestly speaking and listening in that character, it is reasonable to conclude that they were made for the ostensible purpose; and it would tend to impair the necessary confidence if a different inference were drawn. *Aiken v. Kilburne*, 27 Me. 252.

<sup>11</sup> *Aiken v. Kilburne*, 27 Me. 252; *Moore v. Bray*, 10 Pa. St. 519; *Surface v. Bentz*, 228 Pa. St. 610, 21 Ann. Cas. 215, 77 Atl. 922; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

<sup>12</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286; *Holden v. State*, 44 Tex. Crim. 382, 71 S. W. 600.

If, for instance, a prisoner, charged with murder, informs his attorney where the pistol with which the man was murdered is hidden, the attorney cannot state to the jury that he found the pistol, as his finding it was the result only of the knowledge of the place where it was hidden, which was communicated to him by his client; the rule which prohibits him from disclosing professional communications is violated by his stating where the pistol was found, though he refrains from stating that his knowledge of where it was to be found was derived from what his client told him. *State v. Douglass*, 20 W. Va. 770.

On a trial for theft from the person, where the purpose of the State was to show that the amount of money in possession of defendant corresponded with the money taken from the prosecutor, it was held not competent, in order to prove this fact, to require her attorney to testify that when defendant employed him she gave him two \$5 bills; such testimony comes within the rule of a privileged communication to her attorney and is inadmissible. *Holden v. State*, 44 Tex. Crim. 382, 71 S. W. 600.

alter the case;<sup>13</sup> nor is it material that the evidence is to be used in another jurisdiction.<sup>14</sup> Where only a part of a communication between attorney and client is privileged, and its separation from that portion of the communication which is not privileged is involved in difficulty, the whole will be excluded;<sup>15</sup> but if the privileged and unprivileged parts may be safely separated, it would seem that the privileged matter only will be excluded.<sup>16</sup>

One sense is privileged as well as another. An attorney cannot be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as an attorney.<sup>17</sup>

<sup>13</sup> *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *reversing* 15 Hun 26; *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

<sup>14</sup> *Matter of Whitlock*, 51 Hun 351, 3 N. Y. S. 855, *reversing judgment* 15 Civ. Pro. 204, 2 N. Y. S. 685, wherein it was said: "Ordinarily in taking the testimony of citizens or residents of this state, to be used elsewhere, the practice of the courts has been, and is, not to interfere with the course of the examination, so long as no public rights are invaded and no positive statute is violated, leaving the reception or rejection of the testimony to the rules as they shall be administered in the foreign jurisdiction at the time of the trial. But the case before us presents an exception to the rule. Should we compel Mr. Whitlock to answer these questions, we should require him to disclose the very secrets which the statute was intended to protect, and which the public is so deeply interested in preserving. These questions, therefore, and others, if there be any of like import, were illegally and improperly put to

the witness on his cross-examination, and he was clearly justified in refusing to answer them."

<sup>15</sup> In *Maas v. Bloch*, 7 Ind. 202, the court said: "But here is a conversation of which it is admitted a part is privileged, and it is insisted a part is not; and the question is, can a separation of the parts be properly made? Can the part which was uttered as a mere witness be distinguished from that which was uttered as agent of the plaintiff? It will at once be admitted that the task would be involved in difficulty. Who is to determine which part of the conversation was in one character and which in the other? Is it to be done by the attorney or the agent? They might disagree, and the rights of the client might suffer in the controversy. And if the rule is to be established that such separations of single conversations may be attempted, manifestly it will greatly impair the freedom and confidence of communication between the principal and the agent, and seriously embarrass their intercourse."

<sup>16</sup> *Lang v. Ingalls Zinc Co.*, (Tenn.) 49 S. W. 288.

<sup>17</sup> *Robson v. Kemp*, 5 Esp. (Eng.)



Thus it has been held that the privilege extends to information derived from books or papers shown to the attorney by his client, or placed in his hands in his character of attorney or counsel, by such client.<sup>18</sup> To restrict the privilege to oral or written communications would make the rule infinitely narrower than the reason on which it rests;<sup>19</sup> the tendency of the decisions is to authorize the fullest latitude in order to protect a client against any character of communication between him and his attorney transpiring by virtue of that employment, and which may be used to his detriment. And it has been expressly held that it does not matter whether the information has been derived from a client's words, actions, signs, or personal appearance.<sup>20</sup> The rule also applies to the statements made, and advice given, by the attorney to the client,<sup>1</sup> providing, of course, that such communications are

52; *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99.

In *Wheatley v. Williams*, 1 M. & W. (Eng.) 541, the court held, all the judges concurring, that an attorney could not be compelled to state whether an instrument, when shown to him by his client, was stamped or not.

<sup>18</sup> *Brown v. Payson*, 6 N. H. 443; *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117, *affirming* 3 Edw. 538; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65; *State v. Douglass*, 20 W. Va. 770.

<sup>19</sup> *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99.

<sup>20</sup> *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *Kaut v. Kessler*, 114 Pa. St. 603, 7 Atl. 586; *Holden v. State*, 44 Tex. Crim. 382, 71 S. W. 600.

<sup>1</sup> *People v. Hillhouse*, 80 Mich. 580, 45 N. W. 484.

Where a plaintiff, after consultation with his attorney, corrects his testimony, there is no rule of practice which authorizes the opposite counsel to call the attorney to the stand against his objection, and interrogate

him as to what statements he made to his client during such consultation. *Erickson v. Milwaukee, etc., R. Co.*, 93 Mich. 414, 53 N. W. 393.

Words used by an attorney in detailing a statement of a case to a person to whom he applies to become security on the bringing of a writ of error are to be deemed made in the course of judicial proceedings, and are privileged. *Blunt v. Zuntz*, Anth. N. P. (N. Y.) 180.

See *Ryles v. Statham Bank*, 7 Ga. App. 489, 67 S. E. 383, wherein it was said: "We do not think that the rule in relation to advice or information given by counsel to his client is as strict, or as well grounded, as the considerations of public policy which prohibit an attorney's disclosure of facts coming to his knowledge through his client. The client is supposed to communicate facts which, either directly or indirectly, may relate to his cause. The attorney does not usually furnish facts, though he is always presumed to correctly furnish the law to his clients."

of such a character as to be otherwise within the rule.<sup>2</sup>

§ 99. **Knowledge Not Derived from Client.**—It has been held in several cases that the principle of the rule as to privileged communications does not apply to the discovery of facts, within the knowledge of an attorney or counselor, which were not communicated to him by his client, although he became acquainted with such facts while professionally engaged as the attorney or counselor of such client.<sup>3</sup> It is difficult to reconcile this principle with the general rule,<sup>4</sup> or with the application thereof as shown by the preceding section; and Lord Eldon speaks of the distinction as being extremely nice.<sup>5</sup> It would perhaps be a more general, and at the same time a more simple and intelligible, expression of this exception to say that the privilege does not extend to facts coming to the knowledge of the attorney only as a natural or accidental consequence of his occupying that situation, and not derived by him either directly or indirectly in consequence of any confidential

<sup>2</sup> *A statement of fact* made by an attorney to his client, and which apprises the client of equities in a third party, is not a privileged communication; and, therefore, may be proved by the attorney. *Wadsworth v. Loranger*, Harr. (Mich.) 113.

<sup>3</sup> *England.*—*Spenceley v. Schulenburg*, 7 East 357; *Say's Case*, 10 Mod. 40.

*United States.*—*In re Donohue*, 2 Hask. 17, 7 Fed. Cas. No. 3,990; *General Electric Co. v. Jonathan Clark, etc., Co.*, 108 Fed. 170; *In re Ruos*, 159 Fed. 252.

*Alabama.*—*Kling v. Tunstall*, 124 Ala. 268, 27 So. 420.

*Arkansas.*—*Rosewater v. Schwab Clothing Co.*, 58 Ark. 446, 25 S. W. 73.

*California.*—*Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

*Delaware.*—*Chew v. Farmers' Bank*, 2 Md. Ch. 231.

*Illinois.*—*Chillicothe Ferry, etc., Co. v. Jameson*, 48 Ill. 281; *Swain v. Humphreys*, 42 Ill. App. 370.

*Iowa.*—*Stoddard v. Kendall*, 140 Ia. 688, 119 N. W. 138.

*New Hampshire.*—*Patten v. Moor*, 29 N. H. 163.

*New York.*—*Hebbard v. Haughian*, 70 N. Y. 54; *King v. Ashley*, 179 N. Y. 281, 72 N. E. 106, *affirming* 96 App. Div. 143, 89 N. Y. S. 482.

*North Carolina.*—*Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Pennsylvania.*—*Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Tennessee.*—*Lang v. Ingalls Zinc Co.*, 49 S. W. 288.

<sup>4</sup> See *supra*, § 92.

<sup>5</sup> *Parkhurst v. Lowten*, 2 Swanst. (Eng.) 201.

communication made to him.<sup>6</sup> In the carrying out of this exception it has been held that the privilege extends only to communications made by, or on behalf of, the client.<sup>7</sup> If the knowledge was acquired in any other manner the attorney is not only a competent witness with respect thereto, but he may be compelled to testify;<sup>8</sup> and this is especially true as to information derived from collateral quarters.<sup>9</sup> Thus it has been held that an attorney may express his opinion regarding the sanity of his client from observations made in common with others in a nonprofessional capacity, or from facts which did not come to his knowledge because his professional guidance had been sought.<sup>10</sup> These rulings are based on the theory that it is not in the interest of justice to extend the privilege so that by its operation the truth would be suppressed.<sup>11</sup> This exception is not applicable in some states.<sup>12</sup>

Lord Brougham has attempted a classification of what he calls the apparent exceptions to the privilege, and that which is material to our present question he states thus: "Where there could not be said, in any correctness of speech, to be a communication at all, as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases)." *Greenough v. Gaskell*, 1 Myl. & K. (Eng.) 98.

In *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117, Chancellor Walworth says it is a mistake to suppose that everything is privileged that comes to the knowledge of one while acting as attorney; that the privilege extends only to information derived from the client as such, either by oral communications, or from books or papers shown him by

his client or placed in his hands in his character of attorney.

<sup>6</sup> *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65. See also *State v. Tall*, 43 Minn. 273, 45 N. W. 449.

<sup>7</sup> *Randolph v. Quidnick Co.*, 23 Fed. 278; *General Electric Co. v. Jonathan Clark, etc., Co.*, 108 Fed. 170.

<sup>8</sup> *McDougald v. Lane*, 18 Ga. 444; *Skellie v. James*, 81 Ga. 419, 8 S. E. 607; *Chew v. Farmers' Bank*, 2 Md. Ch. 231; *Rogers v. Dare*, Wright (Ohio) 137.

<sup>9</sup> *General Electric Co. v. Jonathan Clark, etc., Co.*, 108 Fed. 170.

<sup>10</sup> *Oliver v. Warren*, 16 Cal. App. 164, 116 Pac. 312; *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245; *Wicks v. Dean*, 103 Ky. 69, 44 S. W. 397.

<sup>11</sup> *Swain v. Humphreys*, 42 Ill. App. 370.

<sup>12</sup> Thus the Texas statute extends the privilege to any fact which comes to the knowledge of the attorney by reason of such relation. There is no qualification except that it must be a fact which he learned by reason of

### § 100. To Whom Communication Must Be Made.—

The rule as to privileged communications is confined strictly to communications made to members of the legal profession,<sup>13</sup> and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks and employees.<sup>14</sup> But it has been held that the principle does not extend to communications made by the defendant to the confidential clerk of a law firm, who, being asked by defendant if he was a lawyer, replied that he was not, and to whom the communications were then made without further in-

his relationship as an attorney to the business to which such fact has reference. It is not required that information of such fact shall come from the client. It matters not from what source it has been obtained; if it was obtained because of the relationship of attorney in and about that particular business, it is privileged. *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

<sup>13</sup> *England*.—*Fountain v. Young*, 6 Esp. 113; *Wilson v. Rastall*, 4 T. R. 759; *Du Barre v. Livette*, Peake N. P. (ed. 1795) 78; *Parkins v. Hawlshaw*, 2 Stark. 239, 3 E. C. L. 393; *Taylor v. Forster*, 2 C. & P. 195, 12 E. C. L. 85.

*Colorado*.—*Machette v. Wanless*, 2 Colo. 169.

*Illinois*.—*Granger v. Warrington*, 8 Ill. 299; *McLaughlin v. Gilmore*, 1 Ill. App. 563.

*Massachusetts*.—*Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Barnes v. Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Hoy v. Morris*, 13 Gray 519, 74 Am. Dec. 650.

*Pennsylvania*.—*Schubkagel v. Dierstein*, 131 Pa. St. 46, 18 Atl. 1059, 6 L.R.A. 431, 25 W. N. C. 185.

*The testimony of a solicitor of*

*patents* who is not an attorney at law is not a privileged communication. *Brungger v. Smith*, 49 Fed. 124.

<sup>14</sup> *Landsberger v. Gorham*, 5 Cal. 450; *Goddard v. Gardner*, 28 Conn. 172; *Hilary v. Minneapolis St. R. Co.*, 104 Minn. 432, 116 N. W. 933; *Sibley v. Waffle*, 16 N. Y. 180; *Lecour v. Importers', etc., Nat. Bank*, 61 App. Div. 163, 70 N. Y. S. 419; *Brand v. Brand*, 39 How. Pr. (N. Y.) 193, N. Y. Code of Civ. Pro. § 835; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

A *stenographer* employed by the attorney-general to assist in preparing a case for trial will not be permitted to disclose facts coming to his knowledge in the course of said employment. Such communications are privileged and the disclosure of them is against public policy. *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

Code Civ. Proc. Cal. § 1881, subd. 2, provides that an attorney's stenographer cannot be examined without his consent concerning any fact learned in such capacity. In re *Loveland*, 162 Cal. 595, 123 Pac. 801.

A *clerk and a stenographer*, who were in the office of the lawyers claimed to have drawn such wills at

quiry or suggestion.<sup>15</sup> The person consulted, however, need not be licensed to practice in all the courts; thus it has been held that the privilege extends to statements made to one licensed to practice only before justices of the peace.<sup>16</sup> It is not enough that the party making the communication believes that the person consulted is an attorney.<sup>17</sup> The privilege does not apply to a mere law student, even though he may be studying in the office of an attorney;<sup>18</sup> nor to magistrates.<sup>19</sup> Where, however, under peculiar circumstances a judge undertakes to give legal advice, while he does not in any technical sense become the attorney of the person to whom it is given, the principles applicable to communications between attorney and client require that the confidence be respected.<sup>20</sup> A

the time of their alleged execution, were not competent to testify as to such matters, or to establish a writing as a copy of the will in question. *Wallace v. Wallace*, 137 N. Y. S. 43.

So, though a clerk in the law office in which a will was prepared was competent to testify as to its execution, where he was a subscribing witness, his testimony was incompetent where based upon a refreshing of his memory by the establishment of a copy of the will by testimony incompetent because within the rule of privilege. *Wallace v. Wallace*, 137 N. Y. S. 43.

<sup>15</sup> *Hawes v. State*, 88 Ala. 37, 7 So. 302.

See also *infra*, § 102.

<sup>16</sup> *Scales v. Kelley*, 2 Lea (Tenn.) 706; *English v. Ricks*, 117 Tenn. 73, 95 S. W. 189.

<sup>17</sup> *Fountain v. Young*, 6 Esp. (Eng.) 113; *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734.

Communications relating to the subject-matter of a suit, made by one of the parties thereto to a person supposed to be an attorney at law, and with a view to engage him professionally in said suit, when such per-

son was not an attorney of any court but was receiving business as one, and was expecting to be, and was, admitted to practice at the next term of the district court, are not privileged under the code. *Sample v. Frost*, 10 Ia. 266. And see to the same effect *Holman v. Kimball*, 22 Vt. 555.

In *People v. Pratt*, 133 Mich. 125, 94 N. W. 752, 67 L.R.A. 923, it was however said *arguendo* that confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice.

<sup>18</sup> *Andrews v. Solomon*, Pet. (C. C.) 356, 1 Fed. Cas. No. 378; *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; *Holman v. Kimball*, 22 Vt. 555.

<sup>19</sup> *Pierson v. Steortz*, Morr. (Ia.) 136.

<sup>20</sup> *People v. Pratt*, 133 Mich. 125, 94 N. W. 752, 67 L.R.A. 923.

Respondent, having been subpoenaed by the grand jury, informed the prosecuting attorney that he would like to talk with some one in whom he had

communication made to a nonprofessional person, merely employed to assist another at a trial before a justice of the peace, is not privileged,<sup>21</sup> even if it is conceded that a litigant can employ any person he may choose to conduct his cause in that tribunal;<sup>1</sup> but there may be occasions when the interests of justice would require a departure from this rule.<sup>2</sup> In New Hampshire, under a

confidence before testifying, and asked if he could not see the judge who had impaneled such jury. The prosecutor took him to the judge's room, to whom respondent stated that he wanted advice. The judge said that he could not give him any advice, and suggested that he see an attorney; but respondent objected that he was not acquainted with any attorneys who were accessible. The judge thereupon told him that he could not advise him for his personal benefit, but would say that, while he was not obliged to testify to anything before the grand jury to incriminate himself, if he did testify he should tell the truth, whatever it was; whereupon respondent, after a little delay, made a confession to the judge. Held, that such confession was a confidential communication, within the principle applicable to the relation of attorney and client, and was inadmissible against respondent. *People v. Pratt*, 133 Mich. 125, 94 N. W. 752, 67 L.R.A. 923.

<sup>21</sup> *McLaughlin v. Gilmore*, 1 Ill. App. 563; *Brayton v. Chase*, 3 Wis. 456.

<sup>1</sup> *McLaughlin v. Gilmore*, 1 Ill. App. 563.

<sup>2</sup> In *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125, it appears, by the bill of exceptions, that one Petty had for many years followed the business of practicing law before justices of the peace, but had not been admitted

to the bar; and, in his capacity as such attorney, a prisoner sought his aid and advice. The admissions made to the said Petty were made in reply to the latter's question as to what the facts were. So far as the record discloses Petty was entirely reputable in his community, and was deemed thoroughly trustworthy. In deciding that the statements made to Petty were privileged the court said: "It was very natural that the prisoner, charged with a grave offense, should seek his aid and counsel. It was, too, most natural that the prisoner, in answer to his adviser's question, should freely confide to him the secrets which he would repose in no one who did not sustain toward him the relation of legal adviser. The record discloses that the prisoner was not seeking simply the solace of some confidential friend in whom he might confide in the hour of his extremity. On the contrary, it was the counsel of some one of superior legal learning and experience he was seeking, and it was for the purpose of putting his legal adviser in possession of the facts which would enable him to give intelligent and valuable legal counsel that the confidence was reposed. Indeed, there was present every element which would invoke the application of the general rule upon this subject except the mere form of the admission of the adviser to practice in courts of record. Every considera-

local statute which gave in express terms to every citizen the right to have his cause managed by any person of good moral character whom he saw fit to employ, it was held that the privilege extended to communications made to any person employed to manage a cause.<sup>3</sup>

### § 101. Relation of Attorney and Client Must Exist. —

To exclude declarations as communications to counsel, or made with a view to employment, their root in the relation, or contemplated relation, of client and attorney must be manifest. They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it.<sup>4</sup> To tax a lawyer's courtesy or liberality for ad-

tion of reason, justice, logic, and fair play would seem to demand that the mere artificial distinction which the state calls upon us to enforce should be made to yield to the modern tendency to apply the reason and spirit of the rule instead of adhering rigidly and sullenly to its letter."

<sup>3</sup> *Bean v. Quimby*, 5 N. H. 94.

<sup>4</sup> *England*.—*Cobden v. Kendrick*, 4 T. R. 432; *Shean v. Philips*, 1 F. & F. 449.

*Alabama*.—*Crawford v. McKissack*, 1 Port. 433; *Williams v. McKissack*, 117 Ala. 441, 22 So. 489; *Baker v. Jackson*, 146 Ala. 688 mem., 40 So. 348; *Frederick v. State*, 39 So. 915.

*California*.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

*Georgia*.—*Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13; *Equitable Securities Co. v. Green*, 113 Ga. 1013, 39 S. E. 434; *Harkless v. Smith*, 115 Ga. 350, 41 S. E. 634.

*Illinois*.—*Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782; *Rockford v. Falver*, 27 Ill. App. 604.

*Indiana*.—*Indianapolis v. Scott*, 72 Ind. 196; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Jennings v. Sturde-*

*vant*, 140 Ind. 641, 40 N. E. 61.

*Iowa*.—*Hanson v. Kline*, 136 Ia. 101, 113 N. W. 504; *Moyers v. Fogarty*, 140 Ia. 701, 119 N. W. 159.

*Kansas*.—*State v. Herbert*, 63 Kan. 516, 66 Pac. 235; *Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92; *Union Pac. R. Co. v. Day*, 68 Kan. 726, 75 Pac. 1021.

*Kentucky*.—*McCoy v. McCoy*, 125 S. W. 177.

*Massachusetts*.—*Lynde v. McGregor*, 13 Allen 172; *Hoar v. Tilden*, 178 Mass. 157, 59 N. E. 641.

*Michigan*.—*Brinkerhoff v. Peek*, 114 Mich. 628, 72 N. W. 621, 4 Detroit Leg. N. 722.

*Missouri*.—*State v. Cummings*, 189 Mo. 626, 88 S. W. 706; *West v. Freeman*, 69 Mo. App. 682.

*Montana*.—*Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795.

*Nebraska*.—*Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Home F. Ins. Co. v. Berg*, 46 Neb. 600, 65 N. W. 780; *Elliott v. Elliott*, 3 Neb. (unofficial) Rep. 832, 92 N. W. 1006.

*New York*.—*Althouse v. Wells*, 40

vice or services is not to employ him,<sup>5</sup> although in some instances a different rule may prevail by virtue of local statutes.<sup>6</sup> Communications made to an attorney, even in the course of his professional employment, by persons other than the client or his agents, are not privileged;<sup>7</sup> thus it has been held that the communica-

Hun 336; *Brennan v. Hall*, 131 N. Y. 160, 29 N. E. 1009, *affirming* 60 Hun 583 mem., 14 N. Y. S. 864; *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843; *Brennan v. Glennon*, 44 App. Div. 107, 60 N. Y. S. 643; *Kitz v. Buckmaster*, 45 App. Div. 283, 61 N. Y. S. 64; *People v. Freeman*, 133 App. Div. 630, 118 N. Y. S. 199; *Sullivan v. Franzreb*, 148 App. Div. 728, 132 N. Y. S. 1117.

*North Carolina*.—*State v. Smith*, 138 N. C. 700, 50 S. E. 859.

*Ohio*.—*Smart v. N. C. Lodge No. 2*, 27 Ohio Cir. Ct. Rep. 273.

*Oregon*.—See *In re Young*, 59 Ore. 348, Ann. Cas. 1913B 1310, 116 Pac. 95, 1060.

*Pennsylvania*.—*Swayne v. Swayne*, 19 Pa. Super. Ct. 160.

*Tennessee*.—*Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Henry v. Nubert*, 35 S. W. 444.

*Texas*.—*Flack v. Neill*, 26 Tex. 273; *Simmons Hardware Co. v. Kaufman*, 77 Tex. 131, 8 S. W. 283; *Walker v. State*, 19 Tex. App. 176; *Kahn v. State*, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

*Utah*.—*State v. Snowden*, 23 Utah 318, 65 Pac. 479.

*Vermont*.—*Earle v. Grout*, 46 Vt. 113; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72.

*Before Employment*.—An attorney at law is a competent witness as to what occurred when a husband originally deposited bonds in a safe deposit vault rented by him for his wife,

where the relation of attorney and client did not then subsist between the husband and the witness; and, where he was thereafter employed as counsel for both husband and wife, he may testify as to conversations which took place in the presence of both. *Leitch v. Diamond Nat. Bank*, 234 Pa. St. 557, 83 Atl. 416.

*Relation Terminated*.—Where the relation of attorney and client had terminated when the attorney received a letter from his former client with reference to decedent's estate, the attorney was not disqualified to testify. *In re Young*, 59 Ore. 348, Ann. Cas. 1913B 1310, 116 Pac. 95, *rehearing denied* 59 Ore. 362, Ann. Cas. 1913B 1316, 116 Pac. 1060.

<sup>5</sup> *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13.

<sup>6</sup> Under the Iowa statute it has been held that the relation of attorney and client need not necessarily exist to render a confidential communication privileged. It matters not from whom the communication is received, if it is made to a practicing attorney in his professional capacity, and necessary for him to discharge the functions of his office. *State v. Houseworth*, 91 Ia. 740, 60 N. W. 221; *State v. Swafford*, 98 Ia. 362, 67 N. W. 284.

<sup>7</sup> *Randolph v. Quidnick Co.* 23 Fed. 278.

Where three persons were indicted for conspiracy, it was held that statements made by one of them to coun-



tions made by a party to one who generally acted as his attorney, but who, at the time the statements were made, was acting as attorney for other persons, are not privileged.<sup>8</sup> So, also, it has been held that the privilege does not extend to communications made by a nominal party to the suit, who has no interest in it or control over it.<sup>9</sup> But wherever husband and wife have distinct interests, and the wife is induced in dealing with those interests to act under the advice of an attorney employed and paid by the husband, the attorney must be deemed to act as the attorney of both husband and wife, and the communications of the wife to such attorney will be entitled to privilege from disclosure,<sup>10</sup> and either spouse would have the right to call for the protection, and also a full inspection, of all documents that should come into the possession of the attorney, during such employment, relating to the transactions and to the advice given the wife.<sup>11</sup>

**§ 102. Communications between Attorney and Client's Agent, or between Associate Counsel.** — Communications between counsel for the same party touching the subject-matter of

sel for another, who was not the legal adviser of the person making the statement, were not privileged communications, although, after they were made, there was some talk of his becoming also counsel for the one making the statement, but no such relation was ever established between them. *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058.

An attorney who represented defendant's husband on a charge of larceny made by her against him is not incompetent to testify, in the prosecution of defendant for the murder of her husband, as to conversations between the defendant and her husband occurring in the attorney's office, since he in no way represented defendant. *State v. Cummings*, 189 Mo. 626, 88 S. W. 706.

<sup>8</sup> *Wilson v. Godlove*, 34 Mo. 337.

Attys. at L. Vol. I.—12.

<sup>9</sup> *Allen v. Harrison*, 30 Vt. 219, 73 Am. Dec. 302.

<sup>10</sup> *Warde v. Warde*, 3 Macn. & G. (Eng.) 365, 1 Sim. N. S. 18.

On the trial of an action brought by a married woman to recover possession of her separate real estate from her vendee, a witness may not, over her objection, detail a conversation had with her by him as the attorney of her husband in relation to the sale of certain personal property purchased with money derived from the sale of such real estate. In such case the attorney will be regarded as the attorney of both the husband and wife. *Scranton v. Stewart*, 52 Ind. 68.

<sup>11</sup> *Scranton v. Stewart*, *supra*: *Warde v. Warde*, 3 Macn. & G. (Eng.) 365, 1 Sim. N. S. 18.

the litigation are privileged.<sup>12</sup> So, also, communications between an attorney and the agent of his client are entitled to the same protection from disclosure as those passing between attorney and client directly,<sup>13</sup> even though made merely with a view of establishing the relation and securing professional aid for the principal.<sup>14</sup> Thus statements made to an attorney by one who was necessarily employed by the client to act as interpreter in stating the client's case to the attorney, are within the protection of the rule.<sup>15</sup> But communications made by an agent are not privileged as between the agent and the attorney, and with the client's consent the attorney may testify to them;<sup>16</sup> nor are such communications privileged as between the agent and his principal in a suit between them, because in such case the communications cannot be said to be confidential.<sup>17</sup> To be entitled to the benefit of the rule the agency must, of course, be shown to exist;<sup>18</sup> and the communication must be made with a view of employing the attorney on behalf of the principal, or after he has been employed. The inhibition does not extend to communications between the attorney and persons having social or business relations with the client.<sup>19</sup> A mere witness in the cause is not the agent of the litigant in any sense; and, therefore, his communications with the litigant's attorney are not privileged,<sup>20</sup> even though such witness is a scientist called to testify as to the result of his experiments. To hold

<sup>12</sup> *Montgomery v. Perkins*, 94 Fed. 23; *Jones v. Nantahala Marble, etc., Co.*, 137 N. C. 237, 49 S. E. 94; *Missouri, etc., R. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. 1087.

<sup>13</sup> *Fayerweather v. Ritch*, 90 Fed. 13; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295; *Rosebud v. State*, 50 Tex. Crim. 475, 98 S. W. 858; *Selden v. State*, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

<sup>14</sup> *Hawes v. State*, 88 Ala. 37, 7 So. 302.

<sup>15</sup> *Maas v. Bloch*, 7 Ind. 202.

<sup>16</sup> *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483.

Statements of a wife, made as her husband's agent to his attorney, are not privileged in a subsequent action against her where the husband waives the privilege. *Leyner v. Leyner*, 123 Ia. 185, 98 N. W. 628.

<sup>17</sup> *Frank v. Morley*, 106 Mich. 635, 64 N. W. 577.

<sup>18</sup> *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018; *Com. v. Best*, 180 Mass. 492, 62 N. E. 748.

<sup>19</sup> *People v. Heart*, 1 Cal. App. 166, 81 Pac. 1018; *Haulenbeck v. McGibbon*, 60 Hun 26, 20 Civ. Pro. 406, 14 N. Y. S. 393.

<sup>20</sup> *Lalancé, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563. See also

that such communications were privileged might very well open the door to gross abuses.<sup>1</sup> The communications of an expert who acts as the agent of the litigant in aiding counsel to conduct the cause are, of course, privileged;<sup>2</sup> it would seem, however, that in such case the privilege is lost when the expert allows himself to be made a witness, at least to the extent to which he testifies.<sup>3</sup>

### § 103. Attorney Acting as Scrivener or Notary Public. —

Where an attorney is employed merely to put in legal form and phrase certain documents or agreements of the parties, the fact that he is skilled in the law will not make him incompetent as a witness, nor can the communications made by the parties to him be considered as privileged,<sup>4</sup> and this is especially true if all the

*Ford v. McLane*, 131 Mich. 371, 91 N. W. 617, 9 Detroit Leg. N. 349.

Where a witness on cross-examination has denied that she had discussed the nature of her testimony with the counsel for the party who called her, the attorney himself may be called and compelled to state whether she did tell him the nature of her testimony. *Bergmann v. Manes*, 141 App. Div. 102, 125 N. Y. S. 973.

<sup>1</sup> *Lalancé, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563.

<sup>2</sup> *Patent Litigation*.—It is quite conceivable that a patent may be owned by a corporation which would be the actual party litigant, but the entire management of its affairs touching the use of such patent, and the taking of whatever steps may be necessary to sustain it and prevent infringement, be confided to some general manager or superintendent, skilled in the art, upon whose judgment solely the officers of the corporation might be accustomed to rely in deciding whether they should prose-

cute an action or refrain from doing so, and be the sole one finally to determine upon what lines and to what extent the litigation should be conducted. In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the *alter ego* of the complainant; and the privilege which public policy secures to the individual litigant could not be secured to the corporation litigant unless it was so extended as to include him. So, too, questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such a case it would seem fair to apply the same rule to the expert as to the counsel. *Lalancé, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563.

<sup>3</sup> *Lalancé, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563.

<sup>4</sup> *California*.—*Delger v. Jacobs*, 10 Cal. App. 107, 125 Pac. 258.

parties are present when the statements are made.<sup>5</sup> A conveyancer is not a legal adviser; and the relation of client and counsel does not in any proper sense arise between conveyancers and those who employ them, and hence communications made to conveyancers are not privileged,<sup>6</sup> even though such conveyancer is counsel for one of several parties who employ him.<sup>7</sup> This rule has been applied to the drawing of deeds,<sup>8</sup> mortgages,<sup>9</sup> and agreements.<sup>10</sup> But if an attorney at law is employed as such, the mere fact that a part, or even all, of the business for which he was engaged consists of drawing documents, or other papers, would not make him simply a scrivener, nor would communications made to him under such conditions be any the less privileged;<sup>11</sup> and it has been so held as to attorneys employed to draw proofs of loss

*Colorado.*—Machette v. Wanless, 2 Colo. 169; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

*Dakota.*—O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619.

*Georgia.*—Corbett v. Gilbert, 24 Ga. 454.

*Illinois.*—De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371; Smith v. Long, 106 Ill. 485; Spencer v. Razor, 251 Ill. 278, 96 N. E. 300.

*Indiana.*—Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Thomas v. Griffin, 1 Ind. App. 457, 27 N. E. 754; Allen v. Bollenbacher, 97 N. E. 817.

*Iowa.*—Wyland v. Griffith, 96 Ia. 24, 64 N. W. 673; Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 196.

*Michigan.*—Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407.

*Minnesota.*—Hanson v. Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

*Montana.*—Smith v. Caldwell, 22 Mont. 331, 56 Pac. 590.

*Nebraska.*—O'Connor v. Padget, 82 Neb. 95, 116 N. W. 1131.

*New York.*—Van Alstyne v. Smith, 82 Hun 382, 31 N. Y. S. 277; In re

Bellis, 38 How. Pr. 79, 3 Fed. Cas. No. 1,274.

*Texas.*—Childress v. Tate, 148 S. W. 843.

<sup>5</sup> Greer v. Greer, 58 Hun 251, 20 Civ. Pro. 71, 12 N. Y. S. 778. See also *infra* § 117.

<sup>6</sup> In re Matthews, 5 Pa. L. J. Rep. 149, 4 Am. L. J. 356, 1 Phila. 292, 9 Leg. Int. 11. See also *infra* § 107.

<sup>7</sup> Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 407.

<sup>8</sup> Conklin v. Dougherty, 44 Ind. App. 570, 89 N. E. 893; Conway v. Rock, 139 Ia. 162, 117 N. W. 273; Sommer v. Oppenheim, 19 Misc. 605, 44 N. Y. S. 396.

<sup>9</sup> Hatton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Woodruff v. Hurson, 32 Barb. (N. Y.) 557.

<sup>10</sup> Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892.

<sup>11</sup> Hollenback v. Todd, 119 Ill. 543, 8 N. E. 829; Phoenix Ins. Co. v. Wintersmith, 98 N. W. 987, 30 Ky. L. Rep. 369; Watson v. Young, 30 S. C. 144, 8 S. E. 700.

under a policy of fire insurance,<sup>12</sup> an assignment of a mortgage,<sup>13</sup> and deeds.<sup>14</sup> A communication to a person acting merely as a notary public is not privileged,<sup>15</sup> although he had previously acted as attorney, with respect to other matters, for the party making the statements to him.<sup>16</sup>

### § 104. Communications to Prosecuting Attorneys.—

Statements made to a prosecuting attorney or his assistants in their official capacity, for the purpose of originating or forwarding a judicial proceeding for bringing an offender to justice, are privileged.<sup>17</sup> Public policy requires that a person in making such communications should be at liberty to make them without fear of disclosure.<sup>18</sup> The interest of the public in protecting the privacy of a communication seems, indeed, greater when it is made to a prosecuting officer in that capacity than when it is made by a client to his attorney. Persons having knowledge regarding the commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely, and unreservedly, the source and extent of their information. The possibility that what they say under such circumstances will be used against them would tend to impose a natural restraint upon their conduct and to deprive the officer of the benefit of their services.<sup>19</sup> So, also, it has been held that a

<sup>12</sup> *Helbig v. Citizens Ins. Co.* 108 Ill. App. 624.

<sup>13</sup> *Getzlaff v. Seliger*, 43 Wis. 297.

<sup>14</sup> *Robson v. Kemp*, 4 Esp. (Eng.) 235, 5 Esp. 52; *Cromack v. Heathcote*, 2 Brod. & B. 4, 6 E. C. L. 12, 4 Moo. C. Pl. 357; *Phoenix Ins. Co. v. Wintersmith*, 98 S. W. 987, 30 Ky. L. Rep. 369; *Barry v. Coville*, 53 Hun 620, 7 N. Y. S. 36; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

<sup>15</sup> *Lukin v. Halderson*, 24 Ind. App. 645, 57 N. E. 254; *Mutual L. Ins. Co. v. Corey*, 54 Hun 493, 7 N. Y. S. 939, *affirmed* 135 N. Y. 326, 31 N. E. 1095; *Houx v. Blum*, 9 Tex. Civ. App. 588, 29 S. W. 1135.

<sup>16</sup> *Aultman v. Daggs*, 50 Mo. App. 280.

<sup>17</sup> *Oliver v. Pate*, 43 Ind. 132; *State v. Houseworth*, 91 Ia. 740, 60 N. W. 221; *State v. Swafford*, 98 Ia. 362, 67 N. W. 284; *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537; *Schultz v. Strauss*, 127 Wis. 325, 7 Ann. Cas. 528, 106 N. W. 1066.

<sup>18</sup> *Oliver v. Pate*, 43 Ind. 132; *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537.

<sup>19</sup> *State v. Blydenburg*, 135 Ia. 264, 14 Ann. Cas. 443, 112 N. W. 634; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537.

prosecuting attorney cannot testify as to statements made to him by a prisoner on an application to be allowed to give evidence for the state.<sup>1</sup> And, of course, statements made to one as private counsel, and not as an officer, would be none the less privileged because the counsel so consulted was a prosecuting attorney,<sup>2</sup> or was employed for the purpose of assisting in a criminal prosecution.<sup>3</sup> The immunity from the disclosure of communications made to a prosecuting officer is a privilege personal to the person making them, and is not waived by his voluntarily testifying generally, in an action against him for malicious prosecution, in his own behalf,<sup>4</sup> but such privilege is waived if, being a witness in his own behalf, he voluntarily discloses what statements he made to the prosecuting attorney, who then may testify in relation to the communication.<sup>5</sup> So, also, a witness who denies statements made by him to the prosecuting attorney may be contradicted by that officer.<sup>6</sup> In some states it has been held that communications made to the prosecuting attorney are not privileged, the theory being that such officer is not counsel for those who consult him in his official capacity;<sup>7</sup> but even those authorities concede that there are cases where communications made in confidence to a public prosecutor in relation to the commission of a crime, would fall within the rule.<sup>8</sup> It has also been held that the evidence of a witness before a

<sup>1</sup> *State v. Phelps, Kirby* (Conn.) 282.

*Admissions of guilt* made by the defendant to the assistant state's attorney to procure a discontinuance of the prosecution are not privileged as communications between attorney and client. *State v. Schumacher*, 21 N. D. 591, 132 N. W. 143.

<sup>2</sup> *State v. Blydenburg*, 135 Ia. 264, 14 Ann. Cas. 443, 112 N. W. 634.

<sup>3</sup> *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621.

<sup>4</sup> *Oliver v. Pate*, 43 Ind. 132.

<sup>5</sup> *Oliver v. Pate*, 43 Ind. 132. See also *infra*, §§ 130, 131.

<sup>6</sup> *State v. Rash*, (Del.) 78 Atl. 405.

<sup>7</sup> *People v. Davis*, 52 Mich. 569, 18

N. W. 362; *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909. See also *Lange v. Perley*, 47 Mich. 352, 11 N. W. 193, wherein it appears that the county attorney obtained his information as a member of a committee, and not confidentially.

<sup>8</sup> *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962.

In *People v. Davis*, 52 Mich. 569, 18 N. W. 362, it was said: "We are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of

grand jury, given in the hearing of the prosecuting attorney during the investigation of an alleged crime, is not a privileged communication to such attorney;<sup>9</sup> but it is the duty of the attorney for the state not to divulge what passes in the grand jury room unless he is required so to do in a court of justice.<sup>10</sup> There is no relation of attorney and client between the defendants in a prosecution for criminal libel and the prosecuting officer, so as to exclude evidence of such officer as to communications falsely charging a third person with crime.<sup>11</sup>

**§ 105. Communications to Attorney Representing Two or More Persons.** — When two or more clients employ the same attorney in the same business, communications made by them in relation to such business are not privileged inter se;<sup>12</sup> nor are

the state, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the state should be inviolably kept."

<sup>9</sup> *State v. Van Ruskirk*, 59 Ind. 384.

<sup>10</sup> *Clark v. Field*, 12 Vt. 485.

<sup>11</sup> *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982.

<sup>12</sup> *England*.—*Tugwell v. Hooper*, 10 Beav. 348, 16 L. J. Ch. 171; *Warde v. Warde*, 3 Macn. & G. 365, 21 L. J. Ch. 90, 15 Jur. 750, reversing 1 Sim. N. S. 18. See also *Atty. Gen. v. Berkeley*, 2 Jac. & W. 291; *Baugh v. Cradocke*, 1 M. & Rob. 182; *Cleve v. Powel*, 1 M. & Rob. 228; *Shore v. Bedford*, 5 M. & G. 271, 44 E. C. L. 149, 12 L. J. C. Pl. 138; *Perry v. Smith*, C. & M. 554, 41 E. C. L. 301, 9 M. & W. 681; *Ross v. Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. 61.

*Canada*.—*Holmes v. Matthews*, 3 Grant Ch. (U. C.) 379.

*Alabama*.—*Parish v. Gates*, 29 Ala. 254.

*California*.—*Bauer's Estate*, 79 Cal.

304, 21 Pac. 759; *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365; *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23.

*Illinois*.—*Lynn v. Lyerle*, 113 Ill. 128; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. 782; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

*Indiana*.—*Hanlon v. Doherty*, 100 Ind. 37, 9 N. E. 782; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106. Compare *Bowers v. Briggs*, 20 Ind. 139.

*Kentucky*.—*Rice v. Rice*, 14 B. Mon. 417; *Smick v. Beswick*, 113 Ky. 439, 68 S. W. 439; *Brogan v. Porter*, 145 Ky. 587, 140 S. W. 1007; *Taylor v. Roulstone*, 60 S. W. 867, 61 S. W. 354, 22 Ky. L. Rep. 1515.

*Maryland*.—Compare *Hunter v. Van Bomhorst*, 1 Md. 504.

*Massachusetts*.—*Thompson v. Cashman*, 181 Mass. 36, 62 N. E. 976.

*Michigan*.—*Cady v. Walker*, 65 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834. See also *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. 407; *Frank v. Morley*, 106 Mich. 635, 64 N. W. 577.

such communications privileged as between any one of the parties and the attorney.<sup>13</sup> It is the secrets of the client which affect his right that the law does not permit the attorney to divulge.<sup>14</sup> By selecting the same attorney, and making their communications in the presence of each other, each party waives his right to place those communications under the shield of professional confidence.<sup>15</sup> But the reasoning upon which this exception to the

*Minnesota*.—*Shove v. Martine*, 85 Minn. 29, 88 N. W. 254, 412.

*Missouri*.—*Compare Hull v. Lyon*, 27 Mo. 570.

*Nebraska*.—*Compare Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962.

*Nevada*.—*Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L.R.A. 815; *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290. See also *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L.R.A. 302.

*New Jersey*.—*Gulick v. Gulick*, 39 N. J. Eq. 516, *affirming* 38 N. J. Eq. 402.

*New York*.—*Britton v. Lorenz*, 45 N. Y. 51; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482, *affirming* 50 Hun 600 mem., 2 N. Y. S. 317; *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. 255, *affirming* 42 App. Div. 218, 59 N. Y. S. 724; *Sandiford v. Frost*, 9 App. Div. 55, 41 N. Y. S. 103; *Holmes v. Bloomingdale*, 72 App. Div. 627, 76 N. Y. S. 182; *Sherman v. Scott*, 27 Hun 331; *Hard v. Ashley*, 63 Hun 634 mem., 18 N. Y. S. 413, *affirmed* 136 N. Y. 645, 32 N. E. 1015. See also *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385, *reversing* 38 Barb. 393; *Rosenburg v. Rosenburg*, 40 Hun 91; *Matter of Eckler*, 126 App. Div. 199, 110 N. Y. S. 650. *Compare Yates v. Olmsted*, 56 N. Y. 632.

*North Carolina*.—*Michael v. Foil*,

100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Carey v. Carey*, 108 N. C. 267, 12 S. E. 1038.

*Oregon*.—See *Minard v. Stillman*, 31 Ore. 164, 49 Pac. 976, 65 Am. St. Rep. 815.

*Pennsylvania*.—*Goodwin Gas Stove, etc., Co's. Appeal*, 117 Pa. St. 514, 12 Atl. 736, 2 Am. St. Rep. 696; *In re Seip*, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803; *Brown v. Moosic Mountain Coal Co.* 211 Pa. St. 579, 61 Atl. 76; *Mitchell v. Mitchell*, 212 Pa. St. 62, 61 Atl. 570. See also *Hummel v. Kistner*, 182 Pa. St. 216, 37 Atl. 815; *Weaver's Estate*, 9 Pa. Co. Ct. 516.

*South Carolina*.—*Moffatt v. Hardin*, 22 S. C. 9; *Wilson v. Gordon*, 73 S. C. 155, 53 S. E. 79.

*Virginia*.—See *Clay v. Williams*, 2 Munf. 105, 5 Am. Dec. 453.

*West Virginia*.—*Kirchner v. Smith*, 61 W. Va. 434, 11 Ann. Cas. 870, 58 S. E. 614.

<sup>13</sup> *Minard v. Stillman*, 31 Ore. 164, 49 Pac. 976, 65 Am. St. Rep. 815.

<sup>14</sup> *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356.

<sup>15</sup> *California*.—*Gerety v. O'Sheehan* 9 Cal. App. 447, 99 Pac. 545.

*Georgia*.—*McLean v. Clark*, 47 Ga. 24; *Burnside v. Terry*, 51 Ga. 186; *Brown v. Matthews*, 70 Ga. 1, 4 S. E. 13.



rule is based does not cover controversies between third persons and the several clients, or any of them; in such cases the communications made to their common attorney are entitled to the privilege from disclosure afforded by the rule.<sup>16</sup> Where parties

*Illinois*.—Smith v. Long, 106 Ill. 485.

*Iowa*.—Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 186.

*Kansas*.—Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892.

*Michigan*.—Ewers v. White, 114 Mich. 266, 72 N. W. 184, 4 Detroit Leg. N. 573.

*Nebraska*.—David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

*New York*.—Prouty v. Eaton, 41 Barb. 409; Sherman v. Scott, 27 Hun 331; Rosenberg v. Rosenberg, 40 Hun 91; Matter of Hicks, 47 Hun 637 mem., 14 N. Y. St. Rep. 320; Greer v. Greer, 58 Hun 251, 20 Civ. Pro. 71, 12 N. Y. S. 778; Brand v. Brand, 39 How. Pr. 193; Brennan v. Hall, 131 N. Y. 160, 29 N. E. 1009, affirming 60 Hun 583 mem., 14 N. Y. S. 864; In re Cunnion, 201 N. Y. 123, Ann. Cas. 1912A 834, 94 N. E. 648; Myers v. Brick, 146 App. Div. 197, 130 N. Y. S. 910.

*North Carolina*.—Atlantic, etc., R. Co. v. Atlantic, etc., Co., 147 N. C. 368, 15 Ann. Cas. 363, 61 S. E. 185, 125 Am. St. Rep. 550, 23 L.R.A. (N.S.) 223.

*Pennsylvania*.—McCune v. Scott, 18 Pa. Super. Ct. 263; Swayne v. Swayne, 19 Pa. Super. Ct. 160.

<sup>16</sup> *England*.—Robson v. Kemp, 4 Esp. 233; Doe v. Seaton, 2 Ad. & El. 171, 29 E. C. L. 62; Rochefoucauld v. Boustead, 74 L. T. N. S. 783. See also Chant v. Brown, 9 Hare 790; Enthoven v. Cobb, 2 De G. M. & G. 632;

Macfarlan v. Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649.

*United States*.—Liggett v. Glenn, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286, reversing 47 Fed. 472. Compare Brown v. Grove, 80 Fed. 564, 42 U. S. App. 508, 25 C. C. A. 644.

*Illinois*.—See De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371.

*Indiana*.—Scranton v. Stewart, 52 Ind. 68.

*Kansas*.—Compare Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892.

*Louisiana*.—Harking's Succession, 2 La. Ann. 923.

*Massachusetts*.—National Bank of Republic v. Delano, 177 Mass. 362, 58 N. E. 1079, 83 Am. St. Rep. 281.

*Michigan*.—Compare House v. House, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570.

*Missouri*.—Gray v. Fox, 43 Mo. 570, 97 Am. Dec. 416.

*Nebraska*.—Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154. Compare David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

*Nevada*.—Gruber v. Baker, 20 Nev. 453, 23 Pac. 858, 9 L.R.A. 302.

*New York*.—Root v. Wright, 84 N. Y. 72, 38 Am. Rep. 495, reversing 21 Hun 344. See also Utica Bank v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Richards v. Moore, 60 Hun 577 mem., 14 N. Y. S. 851.

*Pennsylvania*.—See In re Seip, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803. Compare McCune v. Scott,

having diverse or hostile interests or claims which are the subject of controversy, unite in submitting the matter to a common attorney for his advice, they exhibit, in the strongest manner, their confidence in the attorney consulted. The law encourages such efforts for an amicable arrangement of differences, and public policy and the interests of justice are subserved by placing such communications under the seal of professional confidence to the extent at least of protecting them against disclosure by the attorney at the instance of third parties.<sup>17</sup> And in such case neither one of the several clients, not even a majority, contrary to the expressed will of the others, can waive the privilege so as legally to justify the attorney in giving testimony in relation to such privileged communications.<sup>18</sup>

### § 106. Communications to Opponent's Attorney.—

The rule which prohibits the disclosure of communications between attorney and client has no application to statements made by a party or his agent to the attorney for the other party.<sup>19</sup> Nor does the privilege extend to communications between the solicitors of opposite parties; or to communications made by a party to a suit to his attorney, for the purpose of having it communicated to the adverse party.<sup>20</sup> But even though an attorney represents

18 Pa. Super. Ct. 263; Swayne v. Swayne, 19 Pa. Super Ct. 160.

*Texas.*—Harris v. Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

*Vermont.*—Compare Allen v. Harrison, 30 Vt. 219, 73 Am. Dec. 302.

*Washington.*—Hartness v. Brown, 21 Wash. 655, 59 Pac. 491. Compare Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187.

*Wisconsin.*—Herman v. Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922. Compare Dunn v. Amos, 14 Wis. 106.

<sup>17</sup> Root v. Wright, 84 N. Y. 72, 38 Am. Rep. 495, reversing 21 Hun 344.

<sup>18</sup> Hull v. Lyon, 27 Mo. 570; Utica Bank v. Mersereau, 3 Barb. Ch.

(N. Y.) 528, 49 Am. Dec. 189; Minard v. Stillman, 31 Ore. 164, 49 Pac. 976, 65 Am. St. Rep. 815; Hartness v. Brown, 21 Wash. 655, 59 Pac. 491; Herman v. Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

<sup>19</sup> Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365; Jolls v. Keegan, 4 Penn. (Del.) 21, 55 Atl. 340; Thompson v. Wilson, 29 Ga. 539; Gerhardt v. Tucker, 187 Mo. 46, 85 S. W. 552; Bay v. Trusedell, 92 Mo. App. 377; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286.

Communications made by an assignor to the attorney of the assignee are not privileged. Hall v. Rixey, 84 Va. 790, 6 S. E. 215.

<sup>20</sup> Burnside v. Terry, 51 Ga. 186:

one of the parties to a suit, a bona fide communication to him by the other party with a view to his employment in a professional capacity would be privileged.<sup>1</sup> So also it has been held that the privilege extends to cases where the attorney of one party consents to, and actually does, advise the opposing party.<sup>2</sup>

**§ 107. Employment in Professional Capacity.**—The testimony of a witness as to conversations with a party to an action cannot be excluded merely on the ground that the witness is an attorney at law, and that the communication was confidential, unless it also appears that he was the attorney for the party, and that the communication was made in the course of such professional employment.<sup>3</sup> It is the consultation between attorney and client

*Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215, affirming 113 Ill. App. 581; *Thayer v. McEwen*, 4 Ill. App. 416; *List v. List*, 82 S. W. 446, 26 Ky. L. Rep. 601. And see *infra*, § 118.

<sup>1</sup> See also *supra*, § 101.

<sup>2</sup> *Bowers v. Briggs*, 20 Ind. 139.

<sup>3</sup> *England*.—*Williams v. Mudie*, 1 C. & P. 158, 11 E. C. L. 354; *Broad v. Pitt*, 3 C. & P. 518, 14 E. C. L. 423; *Bramwell v. Lucas*, 4 Dowl. & R. 367, 2 B. & C. 745, 9 E. C. L. 233.

*United States*.—*In re Cole*, 8 Rep. 105, 6 Fed. Cas. No. 2,975.

*Alabama*.—*State v. Marshall*, 8 Ala. 302; *Brazier v. Fortune*, 10 Ala. 516.

*California*.—*Satterlee v. Bliss*, 36 Cal. 489; *Carroll v. Sprague*, 50 Cal. 655; *George v. Silva*, 68 Cal. 272, 9 Pac. 257; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

*Connecticut*.—*Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

*District of Columbia*.—*Oliver v. Cameron*, 1 MacArthur & M. 237. *Mo.* 546, 75 S. W. 116.

*Georgia*.—*Turner v. Turner*, 123

Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76.

*Indiana*.—*Borum v. Fouts*, 15 Ind. 50; *Miller v. Palmer*, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107.

*Iowa*.—*Pierson v. Steortz*, Morr. 136; *Reinhart v. Johnson*, 62 Ia. 155, 17 N. W. 452; *State v. Swafford*, 98 Ia. 362, 67 N. W. 284.

*Kansas*.—*State v. Herbert*, 63 Kan. 516, 66 Pac. 235; *Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92; *Union Pac. R. Co. v. Day*, 68 Kan. 726, 75 Pac. 1021.

*Massachusetts*.—*Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415.

*Missouri*.—*State v. Faulkner*, 175

*Nebraska*.—*Brady v. State*, 39 Neb. 529, 58 N. W. 161; *Elliott v. Elliott*, 3 Neb. (unofficial) Rep. 832, 92 N. W. 1006.

*New York*.—*Marsh v. Howe*, 36 Barb. 649; *Bogert v. Bogert*, 2 Edw. 399; *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486; *Mowell v. Van Buren*, 77 Hun 569, 28 N. Y. S. 1035.

*Ohio*.—*Smart v. N. C. Lodge No. 2*, 27 Ohio Cir. Ct. Rep. 273.

which is privileged, and which must ever remain so,<sup>4</sup> even though the attorney after hearing the preliminary statement should decline to be retained further in the cause, or the client after hearing the attorney's advice should decline further to employ him.<sup>5</sup> The test or rule deducible from the authorities seems to be that if statements of fact are made to an attorney at law in good faith, for the purpose of obtaining his professional guidance or opinion, they are privileged; otherwise they are not privileged.<sup>6</sup> The character in which the communications are made and received, and not their relevancy or materiality, must, therefore, decide whether they should be regarded as privileged or not.<sup>7</sup> The rule has no reference to cases where abstract legal opinions are sought and obtained on general questions of law, either civil or criminal. In such cases no facts are, or need be, disclosed implicating the party, and so there is nothing to conceal of a confidential nature.<sup>8</sup> It has been held that communications are not privileged where they are made to an attorney acting merely in the capacity of a

*Pennsylvania.*—*Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Texas.*—*Flack v. Neill*, 26 Tex. 273; *Hyman v. Grant*, 102 Tex. 50, 112 S. W. 1042.

*Utah.*—*State v. Snowden*, 23 Utah 318, 65 Pac. 479.

*Vermont.*—*Dixon v. Parmelee*, 2 Vt. 185; *Earle v. Grout*, 46 Vt. 113.

<sup>4</sup> *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245.

*Drawing Affidavits.*—A communication to an attorney in reference to his client's personal estate, made upon retaining him to draw an affidavit for the purpose of procuring a reduction of the assessment of such estate, is privileged. *Williams v. Fitch*, 18 N. Y. 546.

*Drawing Petition for Freedom.*—An application to an attorney at law,

by a colored person, to draw a petition to the legislature for his freedom, is not a privileged communication between attorney and client. *Quare*, if the disclosure had been of the facts upon which he rested his claim to freedom. *State v. Marshall*, 8 Ala. 302.

<sup>5</sup> See *supra*, § 101.

<sup>6</sup> *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848; *Granger v. Warrington*, 8 Ill. 299; *Wade v. Ridley*, 87 Me. 368, 32 Atl. 975.

<sup>7</sup> *Aiken v. Kilburne*, 27 Me. 252.

*Statements made by an applicant for a pension* to one acting as his attorney in the matter, are privileged communications. *Mutual L. Ins. Co. v. Selby*, 72 Fed. 980. 44 U. S. App. 282, 19 C. C. A. 331.

<sup>8</sup> *McMannus v. State*, 2 Head (Tenn.) 213. And see *supra*, § 103.

conveyancer,<sup>9</sup> or scrivener,<sup>10</sup> or attorney in fact,<sup>11</sup> or agent,<sup>12</sup> or as a friend.<sup>13</sup> Mere casual conversations with an attorney, and legal advice given in the course of such conversation for which compensation was neither asked nor expected, are not entitled to the benefit of the privilege,<sup>14</sup> even though they have reference to matters about which it was probable there would be litigation.<sup>15</sup> To constitute professional employment, however, it is not essential that the client should have employed the attorney professionally on any previous occasion.<sup>16</sup> An attorney is employed when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings or advocating his client's cause in open court.<sup>17</sup> If a person, in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such

<sup>9</sup> Later *v. Haywood*, 12 Idaho 78, 85 Pac. 494; In re Matthews, 5 Pa. L. J. Rep. 149, 4 Am. L. J. 356, 1 Phila. 292, 9 Leg. Int. 11; Stallings *v. Hullum*, 79 Tex. 421, 15 S. W. 677; *Contra*, Brand *v. Brand*, 39 How. Pr. 193.

<sup>10</sup> See *supra*, § 103.

<sup>11</sup> Collins *v. Johnson*, 16 Ga. 458.

<sup>12</sup> Herman *v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

*An attorney employed solely to procure a loan* for a client acts merely as agent, and communications between them in regard to the loan are not privileged. *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76; *Lifschitz v. O'Brien*, 143 App. Div. 180, 127 N. Y. S. 1091.

<sup>13</sup> *District of Columbia*.—Patten *v. Glover*, 1 App. Cas. 466.

*Georgia*.—O'Brien *v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

*Idaho*.—Later *v. Haywood*, 12 Idaho 78, 85 Pac. 494.

*Illinois*.—Goltra *v. Wolcott*, 14 Ill. 89.

*Indiana*.—McDonald *v. McDonald*, 142 Ind. 55, 41 N. E. 336.

*Kansas*.—State *v. Herbert*, 63 Kan. 516, 66 Pac. 235.

*Michigan*.—Ewers *v. White*, 114 Mich. 266, 72 N. W. 184, 4 Detroit Leg. N. 573.

*South Carolina*.—Branden *v. Gowling*, 7 Rich L. 459.

*Vermont*.—Coon *v. Swan*, 30 Vt. 6.

<sup>14</sup> Coker *v. Oliver*, 4 Ga. App. 728, 62 S. E. 483; In re Monroe, 2 Connolly 395, 20 N. Y. S. 82; Titus *v. Johnson*, 50 Tex. 224.

<sup>15</sup> Thompson *v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742.

<sup>16</sup> Denver Tramway Co. *v. Owens*, 20 Colo. 107, 36 Pac. 848.

<sup>17</sup> Denver Tramway Co. *v. Owens*, 20 Colo. 107, 36 Pac. 848; Evans *v. State*, 5 Okla. Crim. 643, 115 Pac. 809, 34 L.R.A. (N.S.) 577.

consultation, then the professional employment must be regarded as established; and the communication made by the client, or advice given by the attorney, under such circumstances, is privileged.<sup>18</sup>

**§ 108. Judicial Proceedings Unnecessary.**—The rule as to privileged communications extends to every statement which the client makes to his legal adviser for the purpose of professional advice or aid given upon the subject of his rights and liabilities; it is not essential that any judicial proceeding in particular should have been commenced or contemplated.<sup>19</sup> Nor is it material that the client is in no manner before the court where the disclosure is sought to be had.<sup>20</sup> It is enough if the matter in hand may, by possibility, become the subject of judicial inquiry,<sup>21</sup> and the employment of counsel is so connected with his professional character as to afford the presumption that this formed the ground of the confidence reposed,<sup>1</sup> even though a professional person may deem the communication unimportant.<sup>2</sup> Indeed, the advice and assistance of counsel are in many instances invoked for the purpose of more certainly guarding against litigation.<sup>3</sup>

<sup>18</sup> *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

<sup>19</sup> *United States*.—*Alexander v. U. S.*, 138 U. S. 353, 11 S. Ct. 350, 34 U. S. (L. ed.) 954.

*Alabama*.—*Parish v. Gates*, 29 Ala. 254.

*Colorado*.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

*Illinois*.—*Rogers v. Daniels*, 116 Ill. App. 515.

*Indiana*.—*Borum v. Fouts*, 15 Ind. 50; *Bigler v. Reyher*, 43 Ind. 112.

*Kentucky*.—*Carter v. West*, 93 Ky. 211, 19 S. W. 592.

*Nebraska*.—*Brady v. State*, 39 Neb. 529, 58 N. W. 161.

*New York*.—*Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, reversing 15 Hun 26.

*Pennsylvania*.—*Beltzhoover v. Blackstock*, 3 Watts 20, 27 Am. Dec. 330; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Wisconsin*.—*Dudley v. Beck*, 3 Wis. 274.

<sup>20</sup> *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456.

<sup>21</sup> *Rogers v. Daniels*, 116 Ill. App. 515; *Johnson v. Sullivan*, 23 Mo. 474.

<sup>1</sup> *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, reversing 15 Hun 26; *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495, reversing 21 Hun 344; *Moore v. Bray*, 10 Pa. St. 519; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>2</sup> *Moore v. Bray*, 10 Pa. St. 519.

<sup>3</sup> *Bigler v. Reyher*, 43 Ind. 112.

§ 109. **Payment of Retaining Fee.**—While the payment of a retainer is the best evidence that the relation of attorney and clients exists,<sup>4</sup> such payment is not absolutely essential. If an attorney is consulted in his professional capacity, and he allows the consultation to proceed, and acts as adviser, the fact that no compensation was paid will not remove the seal of secrecy from the communications made to him,<sup>5</sup> even if the consultation ends without establishing the relation of attorney and client;<sup>6</sup> and this is true although the client employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterwards retained on the other side.<sup>7</sup> It is enough that the

<sup>4</sup> *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13; *Harkless v. Smith*, 115 Ga. 350, 41 S. E. 634; *State v. Herbert*, 63 Kan. 516, 66 Pac. 235.

<sup>5</sup> *United States*.—*Alexander v. U. S.*, 138 U. S. 353, 11 S. Ct. 350, 34 U. S. (L. ed.) 954.

*Arkansas*.—*Andrews v. Simms*, 33 Ark. 771.

*Colorado*.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

*Indiana*.—*Bowers v. Briggs*, 20 Ind. 139.

*Kansas*.—*Union Pac. R. Co. v. Day*, 68 Kan. 726, 75 Pac. 1021.

*Louisiana*.—*Bailly v. Robles*, 4 Mart. N. S. 361.

*Michigan*.—*Mack v. Sharp*, 138 Mich. 448, 5 Ann. Cas. 109, 101 N. W. 631, 11 Detroit Leg. N. 640.

*Missouri*.—*Cross v. Riggins*, 50 Mo. 335.

*Montana*.—*Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793.

*New York*.—*March v. Ludlum*, 3 Sandf. Ch. 35; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, *reversing* 15 Hun 26.

*Vermont*.—*Earle v. Grout*, 46 Vt. 113.

*Wisconsin*.—*Bruley v. Garvin*, 105

Wis. 625, 81 N. W. 1038, 48 L.R.A. 839.

<sup>6</sup> See *supra*, § 101.

<sup>7</sup> *Cross v. Riggins*, 50 Mo. 335, wherein it was said: "The present record presents the question whether one who seeks counsel, but who in fact pays no fee, and employs others in the prosecution of the business—the counsel consulted being afterwards employed against him—can be so considered as a client that his communications are privileged. I know not where to draw a distinction. The rule should be universal, and apply to all who communicate facts expecting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling perfect freedom in all cases, instead of the perfect confidence that should exist the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and besides, a door would be opened to fraud. One might seek advice, expecting not only to pay but to retain in an anticipated litigation, and, after his story had been heard, the retainer might be declined and the information be used against him;

attorney was applied to for advice or aid in his professional character,<sup>8</sup> the legal obligation to pay a *quantum meruit* being in this respect as effectual a retainer as an actual payment.<sup>9</sup> In like manner, such communications from clients may be privileged although the counsel neither expects nor receives a fee;<sup>10</sup> so, also, a communication to an attorney may be confidential although the party making the communication believes that another person, also interested in the case, is to pay the attorney.<sup>11</sup> The practice of giving advice upon legal subjects without study and examination, and without corresponding pay and a distinct retainer, is certainly a vicious one. The giving of advice in this way misleads the general opinion in regard to the value of legal services. It would no doubt be better for the profession, and their clients both, if all professional advice, in regard to the prosecution and defense of claims, were given in writing, and both parties thereby put under proper responsibility in regard to it, the one to pay for it, and the other to make it hold good, or to show, at least, that it was not notoriously bad.<sup>12</sup>

**§ 110. Subject-Matter of Communication.**—It is sometimes said that all communications between counsel and client are privileged; but this is too general, and is inaccurate. They must relate to the business and interest of the client. It is a well-established rule that, in order to be privileged, a communication

also an obstacle would be thrown in the way of the settlement of disputes. The noblest office of the lawyer is to heal difficulties, and far more is done in that direction in the higher walks of the profession than is known to the public. In seeking this end counsel may receive communications from the opposite party, and not made under circumstances that would exclude them as propositions to compromise. The conventionalities that hedge in the English counselor are unknown in this country, and public policy requires that persons should feel that they may securely say anything to members of

the profession in seeking aid in their difficulties, although the person whose advice they seek may have been employed, or may be afterwards employed, against him.

<sup>8</sup> *Andrews v. Simms*, 33 Ark. 771.

<sup>9</sup> *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

<sup>10</sup> *Oliver v. Cameron*, 1 MacArthur & M. (D. C.) 237; *Evans v. State*, 5 Okla. Crim. 643, 115 Pac. 809, 34 L.R.A. (N.S.) 577.

<sup>11</sup> *Hunter v. Van Bomhorst*, 1 Md. 504.

<sup>12</sup> *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742.



must be made solely because of the relation of attorney and client, and in order to procure the professional advice or assistance of the attorney in relation to the subject-matter of the employment, or to explain something connected with it, so as to enable the attorney the better to advise the client or to manage the litigation.<sup>18</sup> The rule is not, however, confined to communications made for the purpose of enabling an attorney to conduct a cause in court; nor is it necessary that the statement of the client should

<sup>18</sup> *England*.—*Cobden v. Kendrick*, 4 T. R. 432; *Wilson v. Rastall*, 4 T. R. 753; *Turquand v. Knight*, 2 M. & W. 98.

*United States*.—*Chirac v. Reinicker*, 11 Wheat, 280, 6 U. S. (L. ed.) 474.

*Alabama*.—*Crawford v. McKissack*, 1 Port. 433; *State v. Marshall*, 8 Ala. 302.

*California*.—*Hager v. Shindler*, 29 Cal. 61; *Satterlee v. Bliss*, 36 Cal. 489; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518, 14 L.R.A. 65.

*Georgia*.—*Collins v. Johnson*, 16 Ga. 458; *Watkins v. Smith*, 17 Ga. 68; *McDougald v. Lane*, 18 Ga. 444; *Churchill v. Corker*, 25 Ga. 479; *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13; *Skellie v. James*, 81 Ga. 419, 8 S. E. 607; *Philman v. Marshall*, 103 Ga. 82, 29 S. E. 598.

*Illinois*.—*Granger v. Warrington*, 8 Ill. 309; *Goltra v. Wolcott*, 14 Ill. 90; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 81 N. E. 808, 11 L.R.A. (N.S.) 1052.

*Indiana*.—*Borum v. Fouts*, 15 Ind. 52; *Lloyd v. Davis*, 2 Ind. App. 170, 28 N. E. 232.

*Iowa*.—*Pierson v. Steortz*, Morr. 136; *Sample v. Frost*, 10 Ia. 266; *State v. Mewherter*, 46 Ia. 88; *State Attys. at L. Vol. I.*—13.

*v. Stafford*, 145 Ia. 285, 123 N. W. 167.

*Kansas*.—*In re Elliott*, 73 Kan. 151, 84 Pac. 750.

*Kentucky*.—*Denunzio v. Scholtz*, 117 Ky. 182, 4 Ann. Cas. 529, 77 S. W. 715; *Bishoff v. Com.*, 123 Ky. 340, 96 S. W. 538.

*Maine*.—*Wade v. Ridley*, 87 Me. 368, 32 Atl. 975.

*Massachusetts*.—*Hatton v. Robinson*, 14 Pick. 420, 25 Am. Dec. 415.

*Michigan*.—*Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, 7 Detroit Leg. N. 367; *People v. Pratt*, 133 Mich. 125, 94 N. W. 752, 67 L.R.A. 923.

*Nebraska*.—*David Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 206, 75 N. W. 877; *Elliott v. Elliott*, 3 Neb. (unofficial) Rep. 832, 92 N. W. 1006.

*New Hampshire*.—*Brown v. Payson*, 6 N. H. 443.

*New York*.—*Mowell v. Van Buren*, 77 Hun 569, 28 N. Y. S. 1035; *Rochester City Bank v. Suydam*, 5 How. Pr. 254; *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486; *Clark v. Richards*, 3 E. D. Smith 89; *Marsh v. Howe*, 36 Barb. 649; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627.

*North Carolina*.—*Eekhout v. Cole*, 135 N. C. 583, 47 S. E. 655.

*Pennsylvania*.—*Lavers v. Van Bus-*

have been made for the express purpose of getting legal advice. It is sufficient if it is a statement of fact made in the course of the employment and material thereto, or believed to be so.<sup>14</sup> Nor is the circle of protection so narrow as to exclude communications which a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment, and the conversation concerns the subject-matter of the attorney's employment.<sup>15</sup>

### § 111. Confidential Character of Communication. —

It is well settled that, in order to be privileged, a communication must be one which is made to the attorney in confidence for the purposes of his employment. If it appears by extraneous evidence, or from the nature of the transaction or communication, that confidence was not contemplated, and that the communication was not so regarded, then the fact communicated may be proved by the testimony of the attorney.<sup>16</sup> The scope of the confidence

*kirk*, 4 Pa. St. 309; *Moore v. Bray*, 10 Pa. St. 524; *Matthew's Estate*, 1 Phila. 292, 9 Leg. Int. 11; *Weaver's Estate*, 9 Pa. Co. Ct. 516; *In re Cole*, 7 W. N. C. 114, 6 Fed. Cas. No. 2,975.

*Texas*.—*Flack v. Neill*, 26 Tex. 273; *Henderson v. Terry*, 62 Tex. 281; *Stallings v. Hullum*, 79 Tex. 421, 15 S. W. 677. See also *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611; *Pearson v. State*, 56 Tex. Crim. 607, 120 S. W. 1004.

*Vermont*.—*Earle v. Grout*, 46 Vt. 113.

*Wisconsin*.—*Plano Mfg. Co. v. Frawley*, 68 Wis. 577, 32 N. W. 768.

<sup>14</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286, reversing 47 Fed. 472; *National Bank of Republic v. Delano*, 177 Mass. 362, 58 N. E. 1079, 83 Am. St. Rep. 281. See *supra*, § 98 et seq.

<sup>15</sup> *Moore v. Bray*, 10 Pa. St. 519,

524; *Surface v. Bentz*, 228 Pa. St. 610, 21 Ann. Cas. 215, 77 Atl. 922.

It is immaterial that the advice is so simple that an intelligent layman could have given it. This would perhaps characterize the best legal advice that ever was given, but it would be legal advice none the less. *People v. Pratt*, 133 Mich. 125, 94 N. W. 752, 67 L.R.A. 923. See also *supra*, § 98 et seq.

<sup>16</sup> *California*.—*Hager v. Shindler*, 29 Cal. 47; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

*Connecticut*.—*Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

*Idaho*.—*Ex p. Niday*, 15 Idaho 559, 98 Pac. 845.

*Iowa*.—*Shaffer v. Mink*, 60 Ia. 754, 14 N. W. 726; *State v. Swafford*, 98 Ia. 362, 67 N. W. 284.

*Kansas*.—*In re Elliott*, 73 Kan. 151, 84 Pac. 750.

is as the scope of the purpose; each is considered to be the exact measure of the other.<sup>17</sup> In order to render a communication between attorney and client privileged, it must relate to some matter about which the client is seeking advice, or be made in order to put the attorney in possession of information supposed to be necessary to enable him properly and intelligently to serve his client.<sup>18</sup> Thus it has been held that communications between attorney and client concerning an indebtedness of the client to the attorney are not ordinarily within the privilege.<sup>19</sup> So, also, an attorney may give evidence of collateral facts, as, for instance, that his client expressed himself satisfied with a new security.<sup>20</sup> And where an attorney has received money which he is to hold until the question of its ownership shall be determined between the parties, he cannot, in a proceeding of garnishment, refuse to state where he has deposited the money, on the ground that his knowledge of the matter is privileged.<sup>1</sup>

§ 112. Time of Making Communication. — A litigant cannot ordinarily be deprived of the benefit of the evidence of his opponent's attorney as to information acquired by such attorney prior to his retainer.<sup>2</sup> A different rule, however, prevails with respect to communications made to an attorney with a bona fide

*Kentucky.*—Bishoff v. Com., 123 Ky. 340, 96 S. W. 538.

*Louisiana.*—Shanghnessy v. Fogg, 15 La. Ann. 330.

*Massachusetts.*—Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

*Missouri.*—Ex p. Gfeller, 178 Mo. 248, 269, 77 S. W. 552; Schaaf v. Fries, 77 Mo. App. 346; Standard Oil Co. v. Meyer Bros. Drug Co., 84 Mo. App. 76; In re Huffman, 132 Mo. App. 44, 111 S. W. 848.

*Nebraska.*—Home F. Ins. Co. v. Berg, 46 Neb. 600, 65 N. W. 780.

*New York.*—Clark v. Richards, 3 E. D. Smith 89.

*Ohio.*—Smart v. N. C. Lodge No. 2, 27 Ohio Cir. Ct. Rep. 273.

*Pennsylvania.*—In re Turner, 167 Pa. St. 609, 31 Atl. 867; Jeanes v. Fridenberg, 3 Pa. L. J. Rep. 190, 5 Pa. L. J. 65.

*Rhode Island.*—Warren v. Warren, 33 R. I. 71, 80 Atl. 593.

*Washington.*—Collins v. Hoffman, 62 Wash. 278, Ann. Cas. 1913A 1, 113 Pac. 625. See also *supra*, § 110.

<sup>17</sup> Hager v. Shindler, 29 Cal. 47.

<sup>18</sup> See *supra*, § 110.

<sup>19</sup> Herrin v. Abbe, 55 Fla. 769, 46 So. 183, 18 L.R.A.(N.S.) 907.

<sup>20</sup> Heister v. Davis, 3 Yeates (Pa.) 4.

<sup>1</sup> Williams v. Young, 46 Ia. 140.

<sup>2</sup> See *supra*, § 101.

view to his employment in his professional capacity. These are privileged; even though the relation of attorney and client does not result from the consultation, or is never established between the parties.<sup>3</sup> The reason upon which the rule is founded applies with equal force where the attorney is not able to determine whether to withhold or render his professional aid until the applicant has disclosed the merits of his case. Then, if he should decline to act professionally in the matter, on account of previous engagements and prior obligations to others, or from necessity or choice, the disclosures and communications thus made should be privileged. The term "client" should be understood in its most enlarged sense, and the prohibition should close the mouths of all counsel who have listened to disclosures looking to professional aid;<sup>4</sup> and this is true even though the client subsequently denies that he made any statement to such counsel.<sup>5</sup> But neither the rule nor the exception, neither the letter nor the spirit of the

<sup>3</sup> *England*.—Cromack v. Heathcote, 2 Brod. & B. 4, 6 E. C. L. 12, 4 Moo. C. Pl. 357.

*Alabama*.—State v. Tally, 102 Ala. 25, 15 So. 722.

*California*.—Hardy v. Martin, 150 Cal. 341, 89 Pac. 111.

*Colorado*.—Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848.

*Georgia*.—Young v. State, 65 Ga. 525; Peek v. Boone, 90 Ga. 767, 17 S. E. 66; Haywood v. State, 114 Ga. 111, 39 S. E. 948.

*Illinois*.—Thorp v. Goewey, 85 Ill. 611.

*Indiana*.—Reed v. Smith, 2 Ind. 160.

*Iowa*.—Hanson v. Kline, 136 Ia. 101, 113 N. W. 504.

*Maine*.—Sargent v. Hampden, 38 Me. 587; Wade v. Ridley, 87 Me. 368, 32 Atl. 975.

*Massachusetts*.—Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400.

*Michigan*.—Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321.

*Mississippi*.—Crisler v. Garland, 11 Smed. & M. 136, 49 Am. Dec. 49.

*Missouri*.—See West v. Freeman, 69 Mo. App. 682.

*Nebraska*.—Nelson v. Becker, 32 Neb. 99, 48 N. W. 962; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, reversed 68 Neb. 182, 104 N. W. 154.

*New York*.—Carnes v. Platt, 36 Super. Ct. 361, 15 Abb. Pr. N.S. 337. See also Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

*Pennsylvania*.—Surface v. Bentz, 228 Pa. St. 610, 21 Ann. Cas. 215, 77 Atl. 922.

*Texas*.—Rosebud v. State, 50 Tex. Crim. 475, 98 S. W. 858; International, etc., R. Co. v. Duncan, 55 Tex. Civ. App. 440, 121 S. W. 362.

*Utah*.—State v. Snowden, 23 Utah 318, 65 Pac. 479.

*Washington*.—Hartness v. Brown, 21 Wash. 655, 59 Pac. 491.

<sup>4</sup> Cross v. Riggins, 50 Mo. 335.

<sup>5</sup> Gulf, etc., R. Co. v. Gibson, 42 Tex. Civ. App. 306, 93 S. W. 469.

law, extends the privilege to communications voluntarily made to a lawyer after he has informed the person making them that he will not, and cannot, accept the employment to which the communications relate.<sup>6</sup> So, also, where the relation of attorney and client has wholly ceased, communications made to an attorney by a former client are not privileged from disclosure by the attorney;<sup>7</sup> and the fact that the same or similar statements may have been made to the attorney while the confidential relation existed is immaterial, provided such statements are voluntarily repeated after the termination of the relation.<sup>8</sup> But the protection given by the law to communications made during the relationship of attorney and client is perpetual, and does not cease with the termination of the suit, nor is it affected by the party's ceasing to employ the attorney and retaining another, nor by any other change of relation between them, nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it was there placed.<sup>9</sup>

<sup>6</sup> *Farley v. Peebles*, 50 Neb. 723, 70 N. W. 231; *Haulenbeek v. McGibbon*, 60 Hun 26, 20 Civ. Pro. 406, 14 N. Y. S. 393; *People v. Hess*, 8 App. Div. 143, 40 N. Y. S. 486; *Setzar v. Wilson*, 26 N. C. 501; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577, 32 N. W. 768.

<sup>7</sup> *Hager v. Shindler*, 29 Cal. 47; *Donn v. Dow*, 8 Ind. App. 324, 35 N. E. 709; *Theisen v. Dayton*, 82 Ia. 74, 47 N. W. 891; *Hanson v. Kline*, 136 Ia. 101, 113 N. W. 504; *State v. Herbert*, 63 Kan. 516, 66 Pac. 235; *McCoy v. McCoy*, (Ky.) 125 S. W. 177; *Williams v. Benton*, 12 La. Ann. 91; *Mandeville v. Guernsey*, 38 Barb. (N. Y.) 225.

<sup>8</sup> *Brady v. State*, 39 Neb. 529, 58 N. W. 161; *Yordan v. Hess*, 13 Johns. (N. Y.) 492.

<sup>9</sup> *California*.—*Hardy v. Martin*, 150 Cal. 341, 89 Pac. 111.

*Colorado*.—*Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848.

*Delaware*.—*Bush v. McComb*, 2 Houst. 546.

*District of Columbia*.—*Oliver v. Cameron, MacArthur & M.* 237.

*Louisiana*.—*Hart v. Thompson*, 15 La. 88; *Morris v. Cain*, 39 La. Ann. 712, 1 So. 797, 2 So. 418.

*Maryland*.—*Chase's Case*, 1 Bland 206, 17 Am. Dec. 277.

*Michigan*.—*Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, 7 Detroit Leg. N. 367.

*Missouri*.—*Sweet v. Owens*, 109 Mo. 1, 18 S. W. 928.

*New York*.—*Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Walton v. Fairchild*, 4 N. Y. S. 552.

*North Carolina*.—*Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Pennsylvania*.—*Bennett's Estate*, 13 Phila. 331, 37 Leg. Int. 105.

*Texas*.—*McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

§ 113. Documents and Other Writings. — The rule as to privileged communications is not confined to the oral declarations of the client to his counsel; it is equally applicable to documents and all other written instruments, knowledge of which comes to the attorney in his professional capacity, as a confidential disclosure by his client, for the purposes of the business in relation to which the attorney was employed; and the attorney can neither be compelled to produce such writings in court, or to give evidence of their contents, where the client himself could not have been compelled to do so.<sup>10</sup> A paper intrusted to an attorney is in the keeping of his client as much as if it were in his own pocket.<sup>11</sup> More especially has the court no power thus to search the attor-

<sup>10</sup> *England*.—*Robson v. Kemp*, 5 Esp. 52; *Brard v. Ackerman*, 5 Esp. 120; *Rex v. Dixon*, 3 Burr. 1687; *Bluck v. Galsworthy*, 7 Jur. N. S. 91; *Reg. v. Hankins*, 2 C. & K. 823, 61 E. C. L. 823; *Rex v. Hunter*, 4 C. & P. 128, 19 E. C. L. 306; *Rex v. Upper Boddington*, 8 Dowl. & R. 726, 16 E. C. L. 348; *Southwark, etc., Water Co. v. Quick*, 3 Q. B. D. 315.

*United States*.—*Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. 294; *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

*Connecticut*.—*Lynde v. Judd*, 3 Day 499; *Goddard v. Gardner*, 28 Conn. 172.

*District of Columbia*.—*Elliott v. U. S.* 23 App. Cas. 456.

*Georgia*.—*Dover v. Harrell*, 58 Ga. 572; *Philman v. Marshall*, 103 Ga. 82, 29 S. E. 598.

*Idaho*.—*In re Niday*, 15 Idaho 559, 98 Pac. 845.

*Illinois*.—*Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99.

*Louisiana*.—*State v. Hazleton*, 15 La. Ann. 72.

*Massachusetts*.—*Anonymous*, 8 Mass. 370.

*Minnesota*.—*Davis v. New York, etc., R. Co.*, 70 Minn. 37, 72 N. W. 823.

*Missouri*.—*Leschen v. Brazelle*, 164 Mo. App. 415, 144 S. W. 893.

*New Hampshire*.—*Brown v. Payson*, 6 N. H. 443.

*New Jersey*.—*Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

*New York*.—*Coveney v. Tannahill*, 1 Hill 33, 37 Am. Dec. 287; *Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Burtis*, 14 Johns. 391; *People v. Benjamin*, 9 How. Pr. 419; *Genet v. Ketchum*, 62 N. Y. 626.

*Pennsylvania*.—*Com. v. Moyer*, 15 Phila. 397, 38 Leg. Int. 458. See also *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Texas*.—*Downing v. State*, 61 Tex. Crim. 519, 136 S. W. 471.

*Vermont*.—*State v. Squires*, 1 Tyler 147; *Durkee v. Leland*, 4 Vt. 612; *Hicks v. Blanchard*, 60 Vt. 673, 15 Atl. 401; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

*Wisconsin*.—*Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220.

<sup>11</sup> *Anonymous*, 8 Mass. 370.

ney where no notice has been given, either to him or the client, to produce the paper.<sup>12</sup> But if documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel;<sup>13</sup> the privilege is for the benefit of the client, not the attorney, and the latter may be compelled to produce any paper which the client could be compelled to produce.<sup>14</sup> Thus as to papers upon which the rights of both parties depend,<sup>15</sup> and documents which belong to the adverse party.<sup>16</sup> This exception applies even though the client's duty to produce the writing, or give evidence of its contents, depends on a statutory provision.<sup>17</sup> It is often as necessary to secure professional advice from an attorney in regard to drafting papers, as in respect to the conduct of proceedings in court;<sup>18</sup> and, as a general rule, the confidence thus reposed in the attorney is privileged.<sup>19</sup> Thus it has been held that the instructions given by a client to his attorney in relation to papers about to be drafted by the latter, which include a statement as to the purpose to be accomplished, are privileged communications equally with those

<sup>12</sup> *Dover v. Harrell*, 58 Ga. 572; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216.

<sup>13</sup> *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. 294; *Myers v. Kenyon*, 7 Cal. App. 112, 93 Pac. 888; *Travis v. January*, 3 Rob. (La.) 227; *Leschen v. Brazelle*, 164 Mo. App. 415, 144 S. W. 893.

If a party and his counsel could, by transferring from the one to the other important papers required as evidence in a cause, thereby prevent the court from compelling the production of such papers on a trial, it would not be difficult in this way to defeat the administration of justice. Such a combination between a party and his attorney might well, under the circumstances, be considered as entirely distinct from a case where the confidential communications of a client are sought to be disclosed.

*People v. New York*, 29 Barb. (N. Y.) 622.

<sup>14</sup> *Ex p. Maulsby*, 13 Md. 625; *In re Cunlion*, 201 N. Y. 123, Ann. Cas. 1912A 834, 94 N. E. 648; *Bankers' Money Order Assoc. v. Nachod*, 120 App. Div. 732, 105 N. Y. S. 773.

<sup>15</sup> *Allen v. Hartford L. Ins. Co.*, 72 Conn. 693, 45 Atl. 955.

<sup>16</sup> *Travis v. January*, 3 Rob. (La.) 227.

<sup>17</sup> *Bridgeport v. Bridgeport Hydraulic Co.*, 81 Conn. 84, 70 Atl. 650; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

<sup>18</sup> *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654.

<sup>19</sup> *Fayerweather v. Ritch*, 90 Fed. 13; *Blunt v. Strong*, 60 Ala. 572. See also *Graham v. People*, 63 Barb. (N. Y.) 468; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

made respecting a subject of contemplated or pending litigation.<sup>20</sup> But when the document has been executed its contents are no longer confidential, the reason for the rule ceases, and the counsel may as properly testify to the contents as may any other witness.<sup>1</sup> And where the transaction between the attorney and client is the preparation of a written instrument in accordance with the client's directions, and no legal advice is asked or required, the reasons or motives moving the client in making the instrument, if stated to the attorney, are not privileged.<sup>2</sup> Nor are statements, made in connection with the drawing of legal papers, privileged where the idea of a confidential communication is not involved;<sup>3</sup> thus counsel may testify as to the construction placed on a certain writing by himself and his client.<sup>4</sup> Where the privilege applies to a writing, an attorney cannot be compelled to testify as to its appearance when it was placed in his hands;<sup>5</sup> thus he cannot, when examined as a witness, be asked whether a document, shown to him by his client in the course of a professional interview, was then in the same state as when produced on the trial.<sup>6</sup> But where the appearance of the instrument is known to the attorney independently of the confidential relation, he may, it seems, give evidence thereof.<sup>7</sup> The privilege does not extend to writings ob-

<sup>20</sup> *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654; *Rogers v. Lyon*, 64 Barb. (N. Y.) 373; *Lang v. Ingalls Zinc Co.*, (Tenn.) 49 S. W. 288.

Compare *Todd v. Munson*, 53 Conn. 579, 4 Atl. 99, wherein it was held that the instructions of a grantor to an attorney as to the drawing of a deed are not ordinarily privileged communications.

<sup>1</sup> *Fayerweather v. Ritch*, 90 Fed. 13; *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225.

<sup>2</sup> *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 81 N. E. 808, 11 L.R.A. (N.S.) 1052; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

<sup>3</sup> *Toms v. Beebe*, 90 Ia. 612, 58 N.

W. 925; *Bronston v. Bronston*, 141 Ky. 639, 133 S. W. 584.

As to scriveners and the like, see *supra*, § 103.

<sup>4</sup> *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2, affirming 85 Ill. App. 97; *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225.

<sup>5</sup> *Gray v. Fox*, 43 Mo. 570, 97 Am. Dec. 416; *Brown v. Payson*, 6 N. H. 443; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287. See also *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>6</sup> *Wheatley v. Williams*, 1 M. & W. (Eng.) 533; *Brown v. Payson*, 6 N. H. 443.

<sup>7</sup> *Brown v. Foster*, 1 H. & N. (Eng.)



tained by attorneys from sources other than their clients, as where they are received from third parties, whether strangers or opponents.<sup>8</sup> Written statements found upon the person of a prisoner are not privileged, although they were made by him for his counsel.<sup>9</sup>

**§ 114. Execution, Delivery, Appearance, Existence, and Possession of Written Instruments.** — An attorney who is professionally employed to prepare a legal document or other writing for his client, and who afterwards witnesses its execution, may be compelled not only to prove the execution of such instrument,<sup>10</sup> but also to testify whether it was antedated,<sup>11</sup> whether it has been altered since its execution,<sup>12</sup> whether it was actually de-

736; *Baker v. Arnold*, 1 Cai. (N. Y.) 258.

<sup>8</sup> *Davis v. New York, etc., R. Co.*, 70 Minn. 37, 72 N. W. 823.

Where defendant's attorney got possession of certain forged notes from others than defendant, and under circumstances excluding the idea that defendant was in any way connected with the attorney's possession or had knowledge that the attorney had obtained them, the attorney's professional relation with defendant did not render his evidence as to obtaining the notes privileged. *Jordan v. State*, (Tex.) 143 S. W. 623.

<sup>9</sup> *Renfro v. State*, 42 Tex. Crim. 393, 56 S. W. 1013.

<sup>10</sup> *Say's Case*, 10 Mod. (Eng.) 40; *Sandford v. Remington*, 2 Ves. Jr. (Eng.) 189; *Chapman v. Peebles*, 84 Ala. 283, 4 So. 273; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225. See also *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Compare Hernandez v. State*, 18

Tex. App. 134, 51 Am. Rep. 295, wherein it appears that at the trial of the appellant for perjury, alleged to have been committed in an affidavit made by him in support of a motion for new trial filed by one H., who had been convicted of theft, the State was allowed, over objection by the defense, to introduce the attorney of said H., and prove by him that he, at the instance and on the information of appellant, wrote the affidavit on which the perjury was assigned. This proof was objected to on the ground that it was a privileged communication, and it was held that the objection was well taken, and that the trial court erred in overruling it.

Attorney as subscribing witness, see *infra*, § 126.

<sup>11</sup> *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Rundle v. Foster*, 3 Tenn. Ch. 658.

<sup>12</sup> *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. 781, 34 W. N. C. 245.

*Compare* cases cited in the preceding section at note 6.

livered,<sup>13</sup> and to give evidence of any other fact, in connection with the execution of the instrument, which does not involve a disclosure of the client's confidences.<sup>14</sup> The execution of the document, however, does not make the transactions and conversations between counsel and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express, or even any implied, waiver.<sup>15</sup> So, also, an attorney may be compelled to testify as to the existence of a certain paper,<sup>16</sup> and to state whether he has it in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents;<sup>17</sup> and, if it was in his possession at any time, he may be required to state what disposition was made of it.<sup>18</sup> Nor can an attorney be excused from stating, as a witness, how he obtained possession of a paper concerning which the other party has the right to make inquiry.<sup>19</sup> The name of the person from whom papers are obtained cannot be a professional secret.<sup>20</sup>

<sup>13</sup> *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. 781, 34 W. N. C. 245.

<sup>14</sup> *Drunkenness of Client*.—An attorney who prepared papers for his client may testify as to whether the client was drunk, but not to the confidential reasons given for desiring the execution of the papers. *Lang v. Ingalls Zinc Co.*, (Tenn.) 49 S. W. 288.

*Client's Ability to Understand Depositions*.—Where a defendant, after his ex parte deposition was read, testified that he did not understand it, and that he signed it at the instance of his attorney, whom he afterwards discharged, it was held that the testimony of the attorney as to whether defendant understood the deposition was admissible. *Sarro v. Bell*, (Tex.) 126 S. W. 24.

<sup>15</sup> *Fayerweather v. Ritch*, 90 Fed. 13.

As to implied waiver by making attorney subscribing witness, see *infra*, § 126.

<sup>16</sup> *Brandt v. Klein*, 17 Johns. (N. Y.) 335; *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225.

<sup>17</sup> *Rothwell v. King*, 2 Swanst. (Eng.) 221 note; *Cole v. Cheovenda*, 4 Colo. 18; *Stokoe v. St. Paul, etc., R. Co.*, 40 Minn. 545, 42 N. W. 482; *Brandt v. Klein*, 17 Johns. (N. Y.) 335; *Jackson v. McVey*, 18 Johns. (N. Y.) 330; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Zabel v. Schroeder*, 35 Tex. 308. See also *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>18</sup> *Travis v. January*, 3 Rob. (La.) 227; *State v. Gleason*, 19 Ore. 159, 23 Pac. 817.

<sup>19</sup> *Brown v. Payson*, 6 N. H. 443; *Allen v. Root*, 39 Tex. 589.

<sup>20</sup> *Reynolds v. Rowley*, 3 Rob. (La.)

These exceptions are based on the theory that such matters are independent facts, witnessed by the attorney, to which he may testify without disclosing any confidential communication made by the client to him.<sup>1</sup>

§ 115. **Correspondence.** — The correspondence between attorney and client is entitled to privilege from disclosure equally with the oral communications of the client and written instruments given to the attorney for the purposes of his employment.<sup>2</sup> So, also, as to correspondence between associate counsel,<sup>3</sup> and between a prosecuting attorney and the attorney-general.<sup>4</sup> The rule of privilege does not, however, apply to letters written to the attorney by a third person<sup>5</sup> nor to letters written by the attorney to third persons on the client's behalf.<sup>6</sup> The fact that admissions

201, 38 Am. Dec. 233; *Brown v. Payson*, 6 N. H. 443.

<sup>1</sup> *Schattman v. American Credit Indemnity Co.*, 34 App. Div. 392, 54 N. Y. S. 225; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. 781, 34 W. N. C. 245.

<sup>2</sup> *Alabama.*—*Ganus v. Tew*, 163 Ala. 358, 50 So. 1000.

*California.*—*Hardy v. Martin*, 150 Cal. 341, 89 Pac. 111.

*Georgia.*—*Philadelphia F. Assoc. v. Fleming*, 78 Ga. 733, 3 S. E. 420; *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. 962; *Rylee v. Statham Bank*, 7 Ga. App. 489, 67 S. E. 383.

*Massachusetts.*—*Higbee v. Dresser*, 103 Mass. 523.

*Minnesota.*—*Davis v. New York, etc.*, R. Co., 70 Minn. 37, 72 N. W. 823; *Lindahl v. Supreme Court, etc.*, 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L.R.A.(N.S.) 916.

*Missouri.*—*Ebersole v. Rankin*, 102 Mo. 488, 15 S. W. 422.

*Wisconsin.*—*Selden v. State*, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

<sup>3</sup> Where an attorney writes a letter to a client and sends a copy thereof to an associate attorney, such copy is a privileged communication. *Jones v. Nantahala Marble, etc., Co.*, 137 N. C. 237, 49 S. E. 94.

Where a railroad's general attorney employed local counsel to try a suit, the contents of a letter received by such local counsel from his employer, relating to an issue arising at the trial, is privileged. *Missouri, etc., R. Co. v. Williams*, 43 Tex. Civ. App. 549, 96 S. W. 1087.

<sup>4</sup> A federal district attorney represents the United States, and the correspondence between him and the attorney-general is confidential in its nature and cannot be cited by third persons. *U. S. r. Six Lots of Ground*, 1 Woods 234, 27 Fed. Cas. No. 16,299.

<sup>5</sup> *Price v. Hagle*, 171 Mich. 455, 137 N. W. 253.

<sup>6</sup> That a letter is sent by a lawyer in an effort to collect an account does not make it privileged, so as to relieve him from the penalty prescribed by Code 1907, § 6218, for sending a threatening or abusive let-

sought to be put in evidence are contained in a letter written to counsel does not change their character, so long as it appears that such letter is in fact a communication between attorney and client, and was called into existence by reason of that relation.<sup>7</sup> Thus a witness examined under a commission issued out of a court of a foreign country will not be required to answer questions relating to letters, in his possession, written by the parties to the foreign controversy, where such letters were received by him in his capacity as attorney for one of such foreign litigants.<sup>8</sup> But correspondence between attorney and client which does not relate to professional matters, or in which no confidential disclosures are made, is not privileged.<sup>9</sup> It has been so held as to ordinary business letters,<sup>10</sup> and as to letters written by a litigant to his opponent,<sup>11</sup> and a letter written by an attorney to his client, advising him of the terms of an injunction granted against him in a suit in which the attorney was employed.<sup>12</sup> Neither the fact that an attorney communicated with his client, nor the date of the communication, nor the fact that subsequently the client acted under the attorney's advice, is excluded by reason of privilege. Consequently, the postmark on an envelope which contains a letter from the attorney to the client, and the date of the letter itself, are admissible for the purpose of showing the day on which the communication was mailed and received.<sup>13</sup>

### *Limitation of Rule.*

§ 116. Generally. — Although the rule as to privileged communications is inflexible in the cases to which it applies, there

ter, which may tend to provoke a breach of the peace. *Peters v. State*, 166 Ala. 35, 51 So. 952.

<sup>7</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

<sup>8</sup> *Matter of Whitlock*, 51 Hun 351, 3 N. Y. S. 855, reversing judgment 15 Civ. Pro. 204, 2 N. Y. S. 683.

<sup>9</sup> *Bell v. Staacke*, 159 Cal. 193, 115 Pac. 221; *Benton v. Benton*, 106 La. 99, 30 So. 137; *Bankers' Money Order Assoc. v. Nachod*, 120 App. Div.

732, 105 N. Y. S. 773; *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913A 1, 113 Pac. 625.

<sup>10</sup> *Curry v. Charles Warner Co.*, 2 Marv. (Del.) 98, 42 Atl. 425.

<sup>11</sup> *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156, 21 N. E. 1088.

<sup>12</sup> *Aaron v. U. S.*, 155 Fed. 833, 84 C. C. A. 67.

<sup>13</sup> *Rylee v. Statham Bank*, 7 Ga. App. 489, 67 S. E. 383.

are what are sometimes called exceptions to it, but these exceptions are apparent rather than real, and will generally be found upon examination to be entirely without the principle upon which the rule rests. That is, it will be found either that they are not communications from the client to the legal adviser at all, but information which the latter has acquired independently of any such communication or, that, under the circumstances, a waiver of the privilege is implied. And where this is the case, the interests of justice, so far from requiring that the information shall be locked up in the breast of the attorney, demand its publicity, when necessary to guard or to assert the rights of third persons.<sup>14</sup> Nor does the rule preclude the adverse party from resorting to any and all legitimate methods of proof to reach the facts which he desires to have disclosed.<sup>15</sup> The acts of both the client and his attorney, when relevant to the issue, may be fully proven.<sup>16</sup>

**§ 117. Communications in Presence of, or Overheard by, Third Persons.**—In order that the rule or its reason shall apply, it is inherently necessary that the communication made by the client to the attorney, or to his clerk, should be confidential; <sup>17</sup> therefore if the client chooses to make his communication in the presence of third persons, it ceases to be confidential, and is not entitled to the protection afforded by the rule.<sup>18</sup> The privi-

<sup>14</sup> *Chew v. Farmers Bank*, 2 Md. Ch. 231.

<sup>15</sup> *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456.

<sup>16</sup> *State v. Perry*, 4 Idaho 224, 38 Pac. 655.

<sup>17</sup> See *supra*, § 111.

<sup>18</sup> *United States*.—See *In re Donohue*, 2 Hask. 17, 7 Fed. Cas. No. 3,990.

*Alabama*.—*Mobile, etc., R. Co. v. Yeates*, 67 Ala. 164.

*California*.—*Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Piercy v. Percy*, 18 Cal. App. 761, 124 Pac. 561.

*Connecticut*.—*Goddard v. Gardner*, 28 Conn. 172.

*Georgia*.—*Corbett v. Gilbert*, 24 Ga. 454; *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13; *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356; *Fuller v. Wood*, 137 Ga. 66, 72 S. E. 504.

*Illinois*.—*Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215, *affirming* 113 Ill. App. 581; *Champion v. McCarthy*, 228 Ill. 87, 10 Ann. Cas. 517, 81 N. E. 808, 11 L.R.A. (N.S.) 1052; *Kissack v. Bourke*, 132 Ill. App. 360.

*Massachusetts*.—*Day v. Moorc*, 13 Gray 522; *Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415.

*Michigan*.—*Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *House v.*

lege extends only to the attorney, and to persons who are the media of communication between him and his client;<sup>19</sup> therefore, a person in no way connected with him, who was present at the making of the communication, is bound to testify to the facts disclosed.<sup>20</sup> But where a third person was present only part of the time, the evidence should be confined to what was said in his presence.<sup>1</sup> This limitation of the rule is especially applicable where both parties are present at the time the statements are made. These statements are not confidential communications, but facts that occur in the attorney's presence; they are not to be concealed from the opposite party, but are dealings with that party, and from that fact are necessarily within his knowledge. They are, therefore, not within the terms or reason of the rule that prohibits counsel from disclosing communications made to

House, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; *People v. Andre*, 153 Mich. 531, 117 N. W. 55, 15 Detroit Leg N. 503.

*Mississippi*.—*Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510.

*Missouri*.—*Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337; *Weinstein v. Reid*, 25 Mo. App. 41.

*Nebraska*.—*Elliott v. Elliott*, 3 Neb. (unofficial) Rep. 832, 92 N. W. 1006.

*New Hampshire*.—*Patten v. Moor*, 29 N. H. 163.

*New Jersey*.—*Roper v. State*, 58 N. J. L. 420, 33 Atl. 969.

*New York*.—*Jackson v. French*, 3 Wend. 337, 20 Am. Dec. 699; *Brand v. Brand*, 39 How. Pr. 193; *Whiting v. Barney*, 30 N. Y. 342, 86 Am. Dec. 385; *Britton v. Lorenz*, 45 N. Y. 51; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846; *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457; *Matter of McCarthy*, 55 Hun 7, 8 N. Y. S. 578; *Lecour v. Importers', etc., Nat.*

*Bank*, 61 App. Div. 163, 70 N. Y. S. 419; *In re Eckler*, 126 App. Div. 199, 110 N. Y. S. 650, *reversing* 47 Misc. 320, 95 N. Y. S. 986; *Cooperson v. Pollon*, 30 Misc. 619, 62 N. Y. S. 772; *In re Simmons*, 48 Misc. 484, 96 N. Y. S. 1103.

*Texas*.—*Houx v. Blum*, 9 Tex. Civ. App. 588, 29 S. W. 1135; *Walker v. State*, 19 Tex. App. 176.

*Vermont*.—*State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429. See also *Gross v. State*, 61 Tex. Crim. 176, 135 S. W. 373, 33 L.R.A.(N.S.) 477.

<sup>19</sup> *Morton v. Smith*, (Tex.) 44 S. W. 683.

See *supra*, § 102.

<sup>20</sup> *Pulford's Appeal*, 48 Conn. 247; *State v. Sterrett*, 68 Ia. 76, 25 N. W. 936; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337; *Weinstein v. Reid*, 25 Mo. App. 41; *Baye v. State*, 45 Neb. 261, 63 N. W. 811.

<sup>1</sup> *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355; *Brand v. Brand*, 39 How. Pr. (N. Y.) 193.

them by clients.<sup>2</sup> But where one of the parties went alone to such attorney, because he was his retained attorney, and made statements to him, in the absence of the other party, which were apparently confidential, he should not be permitted to testify as to such statements.<sup>3</sup> A third person who overhears a confidential communication between an attorney and his client may testify thereto; as the rule, which prohibits an attorney from testifying as to a privileged communication made to him by his client, has no application to a third person who by accident or design overheard the communication.<sup>4</sup> It has been held that no reason of necessity requires that any witness, save an interpreter, should ever be present at a consultation between the client and his attorney.<sup>5</sup> But such a rule is too narrow. It would exclude the presence of the client's agents, who, in some instances at least, must be present at conferences between attorney and client in order that counsel may obtain accurate information of the facts,<sup>6</sup> and it would also exclude cases where a parent must accompany a child and be present during the interview, as, by way of illustration, where a female child is obliged to discuss matters of a delicate nature with counsel.<sup>7</sup> But the mere fact that a third person was present during a consultation between attorney and client does not of itself qualify the attorney as a witness to what

<sup>2</sup> *Dominguez v. Citizens' Bank & Trust Co.*, 62 Fla. 148, 56 So. 682; *Stone v. Minter*, 111 Ga. 45, 36 S. E. 321, 50 L.R.A. 356; *Rester v. Powell*, 120 La. 406, 45 So. 372; *Deuser v. Walkup*, 43 Mo. App. 625; *Deuser v. Hamilton*, 52 Mo. App. 394; *Carr v. Weld*, 19 N. J. Eq. 319; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Hummel v. Kistner*, 182 Pa. St. 216, 37 Atl. 815.

<sup>3</sup> *Dominguez v. Citizens' Bank & Trust Co.* 62 Fla. 148, 56 So. 682.

<sup>4</sup> *State v. Perry*, 4 Idaho 224, 38 Pac. 655; *Hoy v. Morris*, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *State v. Falsetta*, 43 Wash. 159, 10 Ann. Cas. 177, 86 Pac. 168.

<sup>5</sup> *Goddard v. Gardner*, 28 Conn. 172.

*Attorney's Son Present at Consultation.*—Where a communication was made by a client to an attorney, in the office of the latter, which was in his dwelling house, and in the presence of a son of the attorney, who lived in his family, but who had no connection with the professional business of his father, it was held that the communication was not, in relation to the son, a privileged one, and that it might be disclosed by his testimony. *Goddard v. Gardner*, 28 Conn. 172.

<sup>6</sup> See *supra*, § 102.

<sup>7</sup> *Bowers v. State*, 29 Ohio St. 542.

was said by his client on that occasion;<sup>8</sup> and as between the client and his counsel, the right of the client to have his disclosures kept secret remains, notwithstanding the presence of a stranger.<sup>9</sup>

**§ 118. Communications to Be Made Public, or Conveyed to Others.**—Only communications which are confidential are protected by the rule;<sup>10</sup> those which the attorney, in the discharge of his duty to his client, is of necessity obliged to make public, or are made to him for that purpose, cannot be said to be confidential, and are not privileged.<sup>11</sup> This principle has been applied to pleadings,<sup>12</sup> and to statements made by a client to his attorney of facts to be alleged and incorporated in a pleading which is to be filed in court.<sup>13</sup> But the contents of papers which were prepared with a view to their use as pleadings, and which were never used as such, are not privileged.<sup>14</sup> So, also, it has been held that communications between an applicant for a patent and the patent office, touching an unissued patent, are not recognized as privileged.<sup>15</sup> In the same manner, communications made to an attorney for the purpose of being conveyed by him to others, are

<sup>8</sup> *Brazier v. Fortune*, 10 Ala. 516;  
*Blount v. Kimpton*, 155 Mass. 378.  
29 N. E. 590, 31 Am. St. Rep. 554.

<sup>9</sup> *Blount v. Kimpton*, 155 Mass. 378,  
29 N. E. 590, 31 Am. St. Rep. 554.

<sup>10</sup> See *supra*, § 111.

<sup>11</sup> *Illinois*.—*Scott v. Harris*, 113  
Ill. 447.

*Iowa*.—*Caldwell v. Meltveldt*, 93  
Ia. 730, 61 N. W. 1090.

*Maine*.—*Alden v. Goddard*, 73 Me.  
345.

*New Mexico*.—*Waldo v. Beckwith*,  
1 N. M. 182.

*New York*.—*Martin v. Platt*, 51  
Hun 429, 4 N. Y. S. 359; *Bartlett v.*  
*Bunn*, 56 Hun 507, 10 N. Y. S. 210;  
*Collins v. Robinson*, 72 Hun 495, 25  
N. Y. S. 268; *McTavish v. Denning*,  
Anth. N. P. 113; *People v. Farmer*,  
104 N. Y. 251, 87 N. E. 457.

*Pennsylvania*.—*Beeson v. Beeson*, 9  
Pa. St. 279; *Heaton v. Findlay*, 12  
Pa. St. 304; *Kramer v. Kister*, 187  
Pa. St. 227, 40 Atl. 1008, 44 L.R.A.  
432, 42 W. N. C. 392.

*Texas*.—*Warner Elevator Mfg. Co.*  
*v. Houston*, 28 S. W. 405.

<sup>12</sup> *In re Elliott*, 73 Kan. 151, 84  
Pac. 750; *Cormier v. Richard*, 7 Mart.  
N. S. (La.) 177; *People v. Peterson*,  
60 App. Div. 118, 15 N. Y. Crim.  
421, 69 N. Y. S. 941. See also *War-*  
*ner Elevator Mfg. Co. v. Houston*,  
(Tex.) 28 S. W. 405.

<sup>13</sup> *San Antonio, etc., R. Co. v.*  
*Brooking*, (Tex.) 51 S. W. 537.

<sup>14</sup> *Neal v. Patten*, 47 Ga. 73; *Roon-*  
*ey v. Maryland Casualty Co.*, 184  
Mass. 26, 67 N. E. 882.

<sup>15</sup> *Edison Electric Light Co. v. U.*  
*S. Electric Lighting Co.*, 44 Fed. 294.



stripped of the idea of a confidential disclosure, and therefore are not privileged.<sup>16</sup> Thus, where property has been conveyed<sup>17</sup> or title papers delivered to an attorney,<sup>18</sup> or to a third person,<sup>19</sup> for the purpose of having such property reconveyed or such title papers redelivered to another, the transaction is not a privileged one, and may be disclosed by the attorney.<sup>20</sup> Nor does the privilege extend to communications between the attorney and a third person in the transaction of the client's business,<sup>1</sup> as where the attorney is authorized to enter into a contract,<sup>2</sup> or compromise, in the interest of his client.<sup>3</sup>

**§ 119. Communications in Connection with Preparation of Wills.**—An attorney who prepares a will cannot, during the life of the testator, testify to communications made to him by such testator concerning it, or to the contents of the will itself;<sup>4</sup> but after the testator's death, there is no reason why, in so far

<sup>16</sup> *Alabama*.—*White v. State*, 86 Ala. 69, 5 So. 674.

*Indiana*.—*Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563; *Model Clothing House v. Hirsch*, 42 Ind. App. 270, 85 N. E. 719.

*Kentucky*.—*List v. List*, 82 S. W. 446, 26 Ky. L. Rep. 691.

*Massachusetts*.—*Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406.

*Missouri*.—*State v. Hedgepeth*, 125 Mo. 14, 28 S. W. 160.

*New York*.—*Galle v. Tode*, 74 Hun 542, 26 N. Y. S. 633, *affirmed* 148 N. Y. 270, 42 N. E. 673.

*Pennsylvania*.—See *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Texas*.—*Henderson v. Terry*, 62 Tex. 281.

<sup>17</sup> *Hager v. Shindler*, 29 Cal. 47.

<sup>18</sup> *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578.

*Attys. at L. Vol. I.*—14.

<sup>19</sup> *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756.

<sup>20</sup> *Hager v. Shindler*, 29 Cal. 47; *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756.

<sup>1</sup> *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

<sup>2</sup> *Burnside v. Terry*, 51 Ga. 186; *Kramer v. Kister*, 187 Pa. St. 227, 40 Atl. 1008, 44 L.R.A. 432, 42 W. N. C. 392; *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L.R.A. 512.

<sup>3</sup> *Trenton St. R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393.

<sup>4</sup> *Elliott v. U. S.*, 23 App. Cas. (D. C.) 456; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L.R.A. 188; In

as an objection thereto on the ground of being a privileged communication is concerned, the attorney should not be allowed so to testify.<sup>6</sup> In such cases the reason on which the rule proceeds is wanting; <sup>6</sup> and with the reason, the rule itself ceases,<sup>7</sup> to the end that full and complete justice may be done, not only to the living, but to the dead.<sup>8</sup> By requesting his attorney to draw his

re Downing, 118 Wis. 581, 95 N. W. 876.

<sup>5</sup> *England.*—Russell v. Jackson, 9 Hare 387.

*United States.*—Blackburn v. Crawford, 3 Wall. 175, 18 U. S. (L. ed.) 186; Glover v. Patten, 165 U. S. 394, 17 S. Ct. 411, 41 U. S. (L. ed.) 760.

*California.*—In re Dominici, 151 Cal. 181, 90 Pac. 448.

*District of Columbia.*—Olmstead v. Webb, 5 App. Cas. 38.

*Georgia.*—O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

*Illinois.*—Champion v. McCarthy, 228 Ill. 87, 10 Ann. Cas. 517, 81 N. E. 808, 11 L.R.A.(N.S.) 1052; Wilkinson v. Service, 249 Ill. 146, Ann. Cas. 1912A 41, 94 N. E. 50.

*Indiana.*—Kern v. Kern, 154 Ind. 29, 55 N. E. 1004; Inlow v. Hughes, 38 Ind. App. 375, 76 N. E. 763.

*Iowa.*—See Stoddard v. Kendall, 140 Ia. 688, 119 N. W. 138.

*Kansas.*—Kerr v. Kerr, 85 Kan. 460, 116 Pac. 880.

*Maine.*—Holyoke v. Holyoke, 87 Atl. 40.

*Massachusetts.*—Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L.R.A. 188; Phillips v. Chase, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406.

*Michigan.*—In re Loree, 158 Mich. 372, 122 N. W. 623, 16 Detroit Leg. N. 630.

*Minnesota.*—Coates v. Semper, 82 Minn. 460, 85 N. W. 217.

*Missouri.*—Graham v. O'Fallon, 4 Mo. 338. Compare Sweet v. Owens, 109 Mo. 1, 18 S. W. 928 (set out below).

*Texas.*—Pierce v. Farrar, 126 S. W. 932.

*Utah.*—In re Young, 33 Utah 382, 14 Ann. Cas. 596, 94 Pac. 731, 126 Am. St. Rep. 843, 17 L.R.A.(N.S.) 108.

*Wisconsin.*—In re Downing, 118 Wis. 581, 95 N. W. 876.

Compare Sweet v. Owens, 109 Mo. 1, 18 S. W. 928, wherein it was held that communications to an attorney, employed to draw a will, concerning the amount of land which the testator intended to convey by a deed already executed, are confidential, and, hence, not admissible in an action to reform the deed, after the testator's death, on the ground of mistake.

<sup>6</sup> Blackburn v. Crawford, 3 Wall. 175, 18 U. S. (L. ed.) 186; Glover v. Patten, 165 U. S. 394, 17 S. Ct. 411, 41 U. S. (L. ed.) 760; Dogherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L.R.A. 188; Phillips v. Chase, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406.  
<sup>7</sup> In re Dominici, 151 Cal. 181, 90 Pac. 448; In re Layman, 40 Minn. 371, 42 N. W. 286.

<sup>8</sup> O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202;

will, the client impliedly asks him to do and say whatever may, at any time and place, be requisite for the purpose of establishing the integrity of the will.<sup>9</sup> The attorney's relationship in the matter is material only in determining the weight to which his testimony is entitled.<sup>10</sup> An attorney who has prepared a will may testify as to the mental condition of his client at that time,<sup>11</sup> and as to whether the testator was subjected to undue influence.<sup>12</sup> In some states it has been held that an action by a person who does not claim under the will, against those who do so claim, is not within this exception to the rule, and that in such case the heirs and devisees may claim the privilege.<sup>13</sup> In Maryland it seems that this exception to the general rule does not prevail, and that the privilege applies to the communications under discussion.<sup>14</sup> So, also, in New York the common-law rules of evidence in respect to privileged communications have been materially changed by the Code of Civil Procedure,<sup>15</sup> which prohibits an attorney from disclosing communications between him and a testator, regarding testamentary matters, except in the case of the probate of a will to which the attorney is an attesting witness.<sup>16</sup> When a

In re Young, 33 Utah 382, 14 Ann. Cas. 596, 94 Pac. 731, 126 Am. St. Rep. 843, 17 L.R.A.(N.S.) 108.

<sup>9</sup> In re Nelson, 132 Cal. 182, 64 Pac. 294.

<sup>10</sup> Ross v. Ross, 140 Ia. 51, 117 N. W. 1105.

<sup>11</sup> Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; In re Layman, 40 Minn. 371, 42 N. W. 286; Daniel v. Daniel, 39 Pa. St. 191.

<sup>12</sup> In re Young, 33 Utah 382, 14 Ann. Cas. 596, 94 Pac. 731, 126 Am. St. Rep. 843, 17 L.R.A.(N.S.) 108.

<sup>13</sup> Emerson v. Scott, 39 Tex. Civ. App. 65, 87 S. W. 369. See also Russell v. Jackson, 9 Hare (Eng.) 387, 15 Jur. 1117; Bennett's Estate, 13 Phila. (Pa.) 331, 37 Leg. Int. 105.

<sup>14</sup> Chew v. Farmers' Bank, 2 Md. Ch. 231.

<sup>15</sup> §§ 835, 836.

<sup>16</sup> Butler v. Fayerweather, 91 Fed. 458, 63 U. S. App. 120, 33 C. C. A. 625 (decided under the New York statute); In re Cunnion, 201 N. Y. 123, Ann. Cas. 1912A 834, 94 N. E. 648, *affirming judgment* 135 App. Div. 864, 120 N. Y. S. 266; Bethany M. E. Church v. Brooks, 143 App. Div. 685, 128 N. Y. S. 250; Matter of Sears, 33 Misc. 141, 68 N. Y. S. 363. See also In re Coleman, 111 N. Y. 220, 19 N. E. 71; Loder v. Whelpley, 111 N. Y. 239, 18 N. E. 874, *reversing* 1 Dem. 368; Scott v. Ives, 22 Misc. 749, 51 N. Y. S. 49; Mertens v. Wakefield, 35 Misc. 501, 71 N. Y. S. 1062; Gick v. Stumpf, 126 App. Div. 548, 110 N. Y. S. 712; In re Francis, 73 Misc. 148, 132 N. Y. S. 695; In re Seymour, 76 Misc. 371, 136 N. Y. S. 942.

The following cases were decided

testator requests his attorneys to sign a will as attesting witnesses, he in effect consents that whenever the will is offered for probate they may be called as witnesses and testify to any facts within their knowledge necessary to establish its validity, and waives the requirement of secrecy. This exception has been generally recognized,<sup>17</sup> and applied to instruments other than wills.<sup>18</sup>

**§ 120. Communications in Relation to Contemplated Violation of Law.**—A communication between attorney and client, in order to be privileged, must be lawful; if it is unlawful, public policy forbids its concealment.<sup>19</sup> The rule which protects confidential communications from disclosures is defensive, not offensive. It is intended for use as a shield, not as a sword.<sup>20</sup> Communications made to counsel prior to the commission of a crime which is contemplated by the so-called client, and in reference

before § 836 (N. Y. Code Civ. Pro.) was enacted in its present form: In re Chapman, 27 Hun 573; In re Chase, 41 Hun 203, 4 N. Y. St. Rep. 195; In re Austin, 42 Hun 516, 4 N. Y. St. Rep. 666; Matter of Smith, 61 Hun 101, 15 N. Y. S. 425; Sheridan v. Houghton, 6 Abb. N. Cas. 234, 16 Hun 628; In re Boury, 8 N. Y. St. Rep. 809.

<sup>17</sup> *California*.—In re Wax, 106 Cal. 343, 39 Pac. 624; In re Mullin, 110 Cal. 252, 42 Pac. 645.

*Georgia*.—O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

*Indiana*.—Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

*Iowa*.—Denning v. Butcher, 91 Ia. 425, 59 N. W. 69.

*Nebraska*.—Brown v. Brown, 77 Neb. 125, 108 N. W. 180.

*New York*.—Code Civ. Pro. § 836; In re Gagan, 20 N. Y. S. 426, following In re Coleman, 111 N. Y. 220, 10 N. E. 71. See also the cases cited in the preceding note.

*Wisconsin*.—McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

<sup>18</sup> See *infra*, § 126.

<sup>19</sup> Wade v. Ridley, 87 Me. 368, 32 Atl. 975; People v. Wickes, 112 App. Div. 39, 51, 20 N. Y. Crim. 9, 98 N. Y. S. 163; In re Cole, 7 W. N. C. (Pa.) 114, 6 Fed. Cas. No. 2,975.

A communication made to a lawyer in an effort to enlist his services in inducing a briber to disgorge a certain fund put up by him as the price of certain legislation, is not a privileged communication. State v. Lehman, 175 Mo. 619, 75 S. W. 139.

A communication made by a client to his former attorney is not privileged where it contains a threat to commit a crime. In re Young, 59 Ore. 348, Ann. Cas. 1913B 1310, 116 Pac. 95, 1060.

<sup>20</sup> In re Niday, 15 Idaho 559, 98 Pac. 845; Brigham v. McDowell, 19 Neb. 407, 27 N. W. 384.

to the perpetration thereof, or for the purpose of being guided or assisted therein, are in no sense privileged, and the attorney may testify thereto,<sup>1</sup> providing, of course, that evidence thereof be otherwise competent.<sup>2</sup> The duty which an attorney owes to society, and to the intended victims of the crime contemplated by his client, is higher in character than his duty, if there is any, to one who consults him for such unlawful purposes.<sup>3</sup> One who is actually engaged in committing a wrong can have no privileged witness,<sup>4</sup> nor is it a part of an attorney's duty to assist in the commission of a crime.<sup>5</sup> The relaxation of the rule in this re-

<sup>1</sup> *England*.—*Reg. v. Cox*, 14 Q. B. D. 153.

*United States*.—*U. S. v. Lee*, 107 Fed. 702. See also *Alexander v. U. S.*, 138 U. S. 353, 11 S. Ct. 350, 34 U. S. (L. ed.) 954.

*Connecticut*.—*State v. Barrows*, 52 Conn. 323.

*Iowa*.—*State v. Kidd*, 89 Ia. 54, 56 N. W. 263.

*Massachusetts*.—*Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L.R.A. 188.

*Michigan*.—*People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594.

*Missouri*.—*State v. Faulkner*, 175 Mo. 546, 75 S. W. 116; *Hamil v. England*, 50 Mo. App. 338.

*New Jersey*.—*Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

*New Mexico*.—*Lockhart v. Washington Gold etc., Min. Co.*, 16 N. M. 223, 117 Pac. 833.

*New York*.—*People v. Farmer*, 194 N. Y. 251, 87 N. E. 457; *People v. Petersen*, 60 App. Div. 118, 15 N. Y. Crim. 421, 69 N. Y. S. 941; *Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Coveney v. Tannahill*, 1 Hill 33, 37 Am. Dec. 287; *Goodenough v. Spencer*, 46 How. Prac. 347; *People v. Blakeley*, 4 Park. Crim. 176.

*North Carolina*.—*Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

*Oklahoma*.—*Morris v. State*, 6 Okla. Crim. 29, 115 Pac. 1030.

*Oregon*.—See *In re Young*, 59 Ore. 348, Ann. Cas. 1913B 1310, 116 Pac. 95, 1060.

*Texas*.—*Orman v. State*, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Everett v. State*, 30 Tex. App. 682, 18 S. W. 674.

*Utah*.—*People v. Mahon*, 1 Utah, 205.

<sup>2</sup> On a trial for murder, an attorney employed by the prisoner on the day of the commission of the alleged crime, to draw for him certain papers, viz., a lease and receipt, cannot be compelled to testify to the drawing of such papers by him or to the contents thereof, nor as to the state of either of the papers when delivered to the prisoner, where such papers are not in any manner necessarily connected with the perpetration of any crime, and they cannot of themselves in any way aid in the commission of any fraud or crime. *Graham v. People*, 63 Barb. (N. Y.) 468.

<sup>3</sup> *State v. Barrows*, 52 Conn. 323.

<sup>4</sup> *Lanum v. Patterson*, 151 Ill. App. 36.

<sup>5</sup> *Matthews v. Hoagland*, 48 N. J.

spect is not in contravention of sound public policy, but rather tends to the maintenance of a higher standard of professional ethics, by preventing the relation of attorney and client from operating as a cloak for wrongdoing.<sup>6</sup> In North Carolina this exception to the rule seems to be confined to such intended acts, on the part of the client, as are criminal *per se*, as distinguished from those which are merely *malum prohibitum*.<sup>7</sup> But statements regarding the commission of a crime already committed, made by the party committing it to an attorney at law when consulting him in that capacity, rest upon an entirely different footing; these are privileged communications; and this is true even though the purpose of the interview was to devise means to escape the consequences of the crime.<sup>8</sup>

**§ 121. Communications in Furtherance of Fraudulent Purpose.**—Where an attorney is consulted for the purpose of obtaining advice as to the perpetration of a fraud, or in aid or furtherance thereof, the communications made to him by one having such purpose in view are not privileged.<sup>9</sup> If the client discloses his fraudulent purpose, and the attorney does not join in the scheme but repudiates all connection with it, there cannot be,

Eq. 455, 21 Atl. 1054, wherein it was said that if the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime; in such case he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime.

<sup>6</sup> *Lanum v. Patterson*, 151 Ill. App. 36.

<sup>7</sup> *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286.

<sup>8</sup> *Alexander v. U. S.*, 138 U. S.

353, 11 S. Ct. 350, 34 U. S. (L. ed.) 954.

<sup>9</sup> *England*.—In *re Postlethwaite*, 35 Ch. D. 722.

*Missouri*.—*Weinstein v. Reid*, 25 Mo. App. 41.

*Nebraska*.—*Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384; In *re Watson*, 83 Neb. 211, 119 N. W. 451.

*New York*.—See *Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189.

*Texas*.—*Hyman v. Grant*, 102 Tex. 50, 112 S. W. 1042; *Taylor v. Evans*, 29 S. W. 172.

*Washington*.—*Collins v. Hoffman*, 62 Wash. 278, 113 Pac. 625.

*Wisconsin*.—*Dudley v. Beck*, 3 Wis. 274; *Dunn v. Amos*, 14 Wis. 106.

properly speaking, professional employment to effect such purpose, and consequently there is no privilege; if the client does not frankly and freely disclose his object and intention, as well as the facts, there is no confidential disclosure and, of course, no privilege;<sup>10</sup> if the attorney, knowing the facts, agrees to aid the client in the perpetration of the fraud, he then becomes a party to the transaction, and the communications made to him cease to be entitled to privilege from disclosure.<sup>11</sup> Thus, a communication ceases to be privileged where the client's purpose is to cheat or defraud his creditors,<sup>12</sup> as, for instance, by a fraudulent conveyance of his property<sup>13</sup> or an attempted avoidance of bankruptcy or insolvent laws.<sup>14</sup> A mere suggestion of fraud, however, is not enough to warrant the court to compel the disclosure of statements made by a client to his counsel;<sup>15</sup> nor will the privilege be disregarded for the purpose of showing that the client contemplated some conduct which might render him liable to a civil action by reason of actual or constructive fraud.<sup>16</sup> And it has been held that this exception does not apply in the case of an executed transfer of property, even though it may have been in fraud of creditors.<sup>17</sup>

**§ 122. Handling of Client's Funds or Property.** — An attorney may be required to state whether he has not received certain money of his client, and, if so, whether he has paid it over, and also to state when he paid it, and to whom;<sup>18</sup> the theory being

<sup>10</sup> *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054.

<sup>11</sup> *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054. See also § 120.

<sup>12</sup> *Hamil v. England*, 50 Mo. App. 338.

<sup>13</sup> *In re Bellis*, 3 Ben. 386, 3 Fed. Cas. No. 1,274; *Tyler v. Tyler*, 128 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; *Hamil v. England*, 50 Mo. App. 338; *Stone v. Stitt*, 56 Tex. Civ. App. 465, 121 S. W. 187.

<sup>14</sup> *In re Bellis*, 3 Ben. 386, 3 Fed. Cas. No. 1,274; *Taylor v. Evans*, (Tex.) 29 S. W. 172.

<sup>15</sup> *Higbee v. Dresser*, 103 Mass. 523. See also *Dewey v. Komar*, 21 S. D. 117, 110 N. W. 90.

<sup>16</sup> *Supplee v. Hall*, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

<sup>17</sup> *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491. See also *Hollenback v. Todd*, 119 Ill. 543, 8 N. E. 829; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

<sup>18</sup> *Comstock v. Paie*, 18 La. 479; *Fulton v. Maccracken*, 18 Md. 528, 81 Am. Dec. 620; *Johnson v. Patterson*, 13 Lea (Tenn.) 626; *Aultman v. Ritter*, 81 Wis. 395, 51 N. W. 569; *Koe-*

that whenever an attorney or counselor receives money or other property of his client, he becomes, to that extent, an agent or attorney in fact, and, when interrogated concerning the disposition of such money or property, he is bound to answer.<sup>19</sup> No professional confidence is violated by an attorney in answering questions of this character, even though he obtained knowledge thereof in his professional capacity.<sup>20</sup> So, also, counsel may testify as to the instructions given him by his client, and as to the client's approval of the course pursued by the attorney.<sup>1</sup>

### § 123. Employment and Compensation of Attorney. —

The rule making communications between attorney and client privileged from disclosure does not apply where the inquiry is confined to the fact of the attorney's employment, and the name of the person employing him.<sup>2</sup> An attorney may also be compelled to disclose the character in which his client employed him, whether as executor, trustee, or on his private account;<sup>3</sup> the

*ber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L.R.A. 512.

<sup>19</sup> *Ex p. Gfeller*, 178 Mo. 248, 77 S. W. 552; *Foster v. Wilkinson*, 37 Hun (N. Y.) 242, 244; *Rochester City Bank v. Suydam*, 5 How. Pr. (N. Y.) 254; *Matter of Merriam*, 27 App. Div. 112, 50 N. Y. S. 114; *Phoenix v. Webster*, 40 Misc. 528, 82 N. Y. S. 868; *Howe v. Stuart*, 68 Misc. 352, 123 N. Y. S. 971, *reversing* 67 Misc. 240, 124 N. Y. S. 416.

<sup>20</sup> *Ex p. Gfeller*, 178 Mo. 248, 77 S. W. 552.

<sup>1</sup> *Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384.

<sup>2</sup> *Alabama*.—*Mobile, etc., R. Co. v. Yeates*, 67 Ala. 164; *White v. State*, 86 Ala. 69, 5 So. 674; *Southern Bitulithic Co. v. Hughston*, 58 So. 450.

*California*.—*Satterlee v. Bliss*, 36 Cal. 489; *Security L. & T. Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257.

*Connecticut*.—*Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

*Georgia*.—*Alger v. Turner*, 105 Ga. 178, 31 S. E. 423.

*Louisiana*.—*Shanghnessy v. Fogg*, 15 La. Ann. 330.

*Maine*.—*Gower v. Emery*, 18 Me. 79.

*Minnesota*.—*Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347.

*Nebraska*.—*Brigham v. McDowell*, 19 Neb. 407, 27 N. W. 384.

*New York*.—*Mulford v. Muller*, 3 Abb. App. Dec. 330; *Hampton v. Boylan*, 46 Hun 151, 10 N. Y. St. Rep. 788; *Walti v. Cohen*, 157 App. Div. 65, 141 N. Y. S. 670.

*Pennsylvania*.—*Beeson v. Beeson*, 9 Pa. St. 279. See also *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

*Washington*.—*Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187; *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913A 1, 113 Pac. 625.

<sup>3</sup> *Beckwith v. Benner*, 6 C. & P.



terms of the employment;<sup>4</sup> when the relationship began and ended;<sup>5</sup> and whether he was instructed by one person to follow the directions of another.<sup>6</sup> But the rule itself cannot be encroached upon in making inquiries of this character.<sup>7</sup> Thus the attorney of a plaintiff in ejectment cannot be made to testify whether his client, an administrator, had not employed him to sue for his individual benefit.<sup>8</sup> So, also, it is well settled that an attorney may be examined as to his fee, the contract therefor, and the amount thereof; these matters being deemed to be facts within his own knowledge, rather than confidential communications.<sup>9</sup> But even matters of this nature have, in some cases, been considered privileged.<sup>10</sup> Thus where a client was charged with stealing, among other things, "one hundred and sixty dollars of current silver coin of the United States," it was held to be error to allow his attorney to testify that he paid him as a retainer "forty-five dollars in silver and five dollars in gold," because the transaction was a privileged communication.<sup>11</sup>

**§ 124. Address, Identity, and Handwriting of Client. —**  
An address given by a client to an attorney, while consulting him

681, 25 E. C. L. 595; *Beeson v. Beeson*, 9 Pa. St. 279.

<sup>4</sup> *Collins v. Hoffman*, 62 Wash. 278, Ann. Cas. 1913A 1, 113 Pac. 625.

<sup>5</sup> *Shanghnessy v. Fogg*, 15 La. Ann. 330.

<sup>6</sup> *Gower v. Emery*, 18 Me. 79.

<sup>7</sup> *Matter of Shawmut Min. Co.*, 94 App. Div. 156, 87 N. Y. S. 1059.

<sup>8</sup> "If the question propounded had stopped with the simple inquiry whether they had been employed by John U. Stephens to bring this ejectment suit, it could not be affirmed that a direct answer to it would involve a breach of professional confidence; but when it seeks to elicit as a fact that they were employed to maintain the individual claim of John U. Stephens to the land, and not his

right as administrator of Thomas Stephens, in whom a demise is laid in the declaration, we are strongly impressed that such inquiry does involve the disclosure of a confidential communication — for the question seeks covertly a disclosure of a disclaimer of title for the estate he represents." *Doe v. Roe*, 37 Ga. 289.

<sup>9</sup> *Smithwick v. Evans*, 24 Ga. 461; *Strickland v. Capital City Mills*, 74 S. C. 16, 54 S. E. 220, 7 L.R.A. (N.S.) 426; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703. See also *In re Donohue*, 2 Hask. 17, 7 Fed. Cas. No. 3,990.

<sup>10</sup> *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286 (decided under the Missouri statute).

<sup>11</sup> *State v. Dawson*, 90 Mo. 149, 1 S. W. 827.

in a professional capacity on a business matter, for the purpose of enabling the attorney to communicate with the client in respect thereto, is usually regarded as a privileged communication,<sup>12</sup> subject only to the exception that the court has the right, during the pendency of the action, to direct the plaintiff's attorney to disclose the client's address, providing the relation of attorney and client still exists.<sup>13</sup> Where such relation has ceased to exist, however, the court will not compel the disclosure of the client's address.<sup>14</sup> The court may also compel an attorney, during the pendency of a cause, and perhaps thereafter should occasion therefor arise, to identify his client.<sup>15</sup> The court has a right to know that the client, whose secret is treasured, is actual flesh and blood; and to demand his identification, for the purpose, at least, of

<sup>12</sup> *Matter of Trainor*, 146 App. Div. 117, 130 N. Y. S. 682.

<sup>13</sup> *United States*.—U. S. v. Lee, 107 Fed. 702.

*Maine*.—Alden v. Goddard, 73 Me. 345.

*New York*.—Corbett v. Gibson, 18 Hun 49; Post v. Schneider, 59 Hun 619 mem., 13 N. Y. S. 396; Ninety-nine Plaintiffs v. Vanderbilt, 4 Duer 632; Matter of Malcom, 129 App. Div. 226, 113 N. Y. S. 666, reversing 60 Misc. 324, 113 N. Y. S. 255; Bohling v. Bronson, 130 App. Div. 895, 115 N. Y. S. 29; Matter of Trainor, 146 App. Div. 117, 130 N. Y. S. 682; O'Connor v. O'Connor, 62 Misc. 53, 115 N. Y. S. 965; Richards v. Richards, 64 Misc. 285, 119 N. Y. S. 81.

"If it may be urged that the court should not compel an attorney to give up information received from his client which should betray the client to the authorities, thus putting him in the position of an informer against his client, yet if the attorney knew the usual, general residence of his client, where he, in the usual course of business relations, may be found, and where he might be expected to

be, provided he was not concealing himself from apprehension, but was living as should an unoffending citizen, then, at least, the information should be given." U. S. v. Lee, 107 Fed. 702.

<sup>14</sup> *Hooper v. Harcourt*, 1 H. Bl. (Eng.) 534; Matter of Trainor, 146 App. Div. 117, 130 N. Y. S. 682; Levy v. Coy, 64 Misc. 39, 117 N. Y. S. 949.

<sup>15</sup> *United States*.—U. S. v. Lee, 107 Fed. 702.

*Delaware*.—In re Jones, 6 Penn. 463, 70 Atl. 15.

*Kansas*.—Arkansas City Bank v. McDowell, 7 Kan. App. 568, 52 Pac. 56.

*Louisiana*.—Shanghnessy v. Fogg, 15 La. Ann. 330.

*Massachusetts*.—Com. v. Bacon, 135 Mass. 521.

*New Hampshire*.—Brown v. Payson, 6 N. H. 443.

*New York*.—Havana City R. Co. v. Ceballos, 25 Misc. 660, 56 N. Y. S. 360; Matter of Malcom, 129 App. Div. 226, 113 N. Y. S. 666, reversing 60 Misc. 324, 113 N. Y. S. 255.

testing the statement which has been made by the attorney who places before him the shield of this privilege.<sup>16</sup> So, also, an attorney may be called as a witness to the handwriting of his client, providing he is not required to disclose any matter of confidential communication, or to base his opinion upon any statement of the defendant to him as counsel.<sup>17</sup> If, however, the only information the attorney has on the subject was communicated to him by his client, he could not be compelled to disclose it.<sup>18</sup>

### § 125. Where Attorney Is a Party to Transaction. —

An attorney is not privileged, as a witness, from disclosing facts concerning his client, where he himself is a party to the transaction or agreement which he is called upon to disclose.<sup>19</sup> Thus where the attorney and client both engage in committing a wrongful act, the client cannot prevent a disclosure of the transaction by the attorney, on the ground that the latter became acquainted with the facts as his legal adviser.<sup>20</sup> It has been said that this exception to the rule stands upon higher, and more unequivocal ground, than any of the others.<sup>21</sup> It is true, of course, that if the privilege were suffered to be applied to such cases, a wide door would be opened for the successful perpetration of fraud and crime. Attorneys would be selected as the agents or trustees wherever a cover of darkness was needed; and though but few might be found base enough so to prostitute their high and honorable profession, yet the character of the whole bar would be injured and degraded by the conduct of those few for whom the temptation would be too great.<sup>1</sup>

<sup>16</sup> *U. S. v. Lee*, 107 Fed. 702; *Martin v. Anderson*, 21 Ga. 301.

<sup>17</sup> *Hurd v. Moring*, 1 C. & P. 372, 11 E. C. L. 425; *Dukes v. Davis*, 125 Ky. 313, 101 S. W. 390; *Brown v. Jewett*, 120 Mass. 215; *Johnson v. Daverne*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Holthausen v. Pondir*, 55 Super. Ct. 73, 18 N. Y. St. Rep. 360; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>18</sup> *Johnson v. Daverne*, 19 Johns. (N. Y.) 135, 10 Am. Dec. 198.

<sup>19</sup> *Duffin v. Smith*, Peake N. P. (ed. 1795 Eng.) 108; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>20</sup> *Dudley v. Beck*, 3 Wis. 274.

<sup>21</sup> *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

<sup>1</sup> *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

§ 126. **Attorney as Subscribing Witness.**—An attorney who becomes a subscribing witness to a writing, even though he is the counsel of one of the parties thereto, may be required to testify, as fully as other subscribing witnesses, to the execution, consideration, and the circumstances attending the execution of such writing,<sup>2</sup> and as to the mental competency of the parties at that time.<sup>3</sup> This exception also applies where counsel witnesses the execution of wills.<sup>4</sup> The same reason would render admissible the testimony of the attorney to whom and in whose presence an instrument was executed.<sup>5</sup> But the right to privilege from disclosure in respect to confidential communications made during the preparation of the instrument is not affected.<sup>6</sup> No waiver, however, results from requesting an attorney to become a subscribing witness to an instrument which is not required by law to be witnessed.<sup>7</sup>

§ 127. **Disclosure for Protection of Attorney.**—Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him.<sup>8</sup> So, too, counsel may make such a disclosure when it is necessary for the protection of those with whom he has had

<sup>2</sup> *Doe v. Andrews*, 2 Cowp. (Eng.) 846; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Rousseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578, *reversing* 60 Hun 250, 14 N. Y. S. 712; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Moffatt v. Hardin*, 22 S. C. 9; *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293; *Strickland v. Capital City Mills*, 74 S. C. 16, 54 S. E. 220, 7 L.R.A. (N.S.) 426.

<sup>3</sup> *Boyle v. Robinson*, 129 Wis. 567, 109 N. W. 623.

<sup>4</sup> See § 119.

<sup>5</sup> *Strickland v. Capital City Mills*,

74 S. C. 16, 54 S. E. 220, 7 L.R.A. (N.S.) 426.

<sup>6</sup> *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

<sup>7</sup> *Gick v. Stumpf*, 126 App. Div. 548, 110 N. Y. S. 712.

<sup>8</sup> *Arbuthnot v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 382, 72 S. W. 132; *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Rochester City Bank v. Suydam*, 5 How. Pr. (N. Y.) 254; *Keck v. Bode*, 23 Ohio Cir. Ct. Rep. 413; *Minard v. Stillman*, 31 Ore. 164, 49 Pac. 976, 65 Am. St. Rep. 815; *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L.R.A. 512.

business transactions in the interest of his client.<sup>9</sup> Thus the rule as to privilege has no application where the client, in an action against the attorney, charges negligence or malpractice,<sup>10</sup> or fraud,<sup>11</sup> or other professional misconduct.<sup>12</sup> In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney.<sup>13</sup> It will be observed, however, that the same necessity which creates the exception, limits also its scope and effect, and if a disclosure of the communication is not essential to preserve the rights of the attorney, it continues to be privileged.<sup>14</sup> Counsel should not, in any event, disclose more than is necessary.<sup>15</sup>

### Waiver.

§ 128. **Who May Waive the Privilege.** — The right to privilege from disclosure, to which communications between attorney and client are entitled, belongs to the client, and not to the attorney,<sup>16</sup> and, therefore, the client may renounce or waive it at his pleasure,<sup>17</sup> even though the subject-matter, respecting which the communications were made, has passed to a third person who

<sup>9</sup> *Cummings v. Irvin*, (Tenn.) 59 S. W. 153; *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, 52 L.R.A. 512.

<sup>10</sup> *Nave v. Baird*, 12 Ind. 318; *Stern v. Daniel*, 47 Wash. 96, 91 Pac. 552.

<sup>11</sup> *In re Postlethwaite*, 35 Ch. D. (Eng.) 722; *Pierce v. Norton*, 82 Conn. 441, 74 Atl. 686; *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *State v. Madigan*, 66 Minn. 10, 68 N. W. 179.

<sup>12</sup> *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Reavely v. Harris*, 145 Ill. App. 545, *affirmed* 239 Ill. 526, 88 N. E. 238.

Where a witness intimates in her testimony that the plaintiff's attorney had attempted to induce her to give false evidence, it is not error to permit the attorney, though actively engaged in the trial, to be sworn and

give his version of the matter without withdrawing from the case. *Reavely v. Harris*, 239 Ill. 526, 88 N. E. 238. And see § 120.

<sup>13</sup> *Stern v. Daniel*, 47 Wash. 96, 91 Pac. 552.

<sup>14</sup> *Keck v. Bode*, 23 Ohio Cir. Ct. Rep. 413.

<sup>15</sup> *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550.

<sup>16</sup> *Chirac v. Reinicker*, 11 Wheat. 280, 6 U. S. (L. ed.) 474; *Liggett v. Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286; *Granger v. Warrington*, 8 Ill. 299; *Scott v. Harris*, 113 Ill. 447; *Aiken v. Kilburne*, 27 Me. 252; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Hanna v. Hutchings*, 4 N. Y. Leg. Obs. 343; *State v. Hoben*, 36 Utah 186, 102 Pac. 1000.

<sup>17</sup> *Goddard v. Gardner*, 28 Conn.

objects to their disclosure;<sup>18</sup> and, upon such waiver by the client, the attorney is bound to answer.<sup>19</sup> So, also, the privilege may be waived by the client's executor or administrator,<sup>20</sup> or by his heirs.<sup>1</sup> It has been held that the successor of an assignee for the benefit of creditors, or other trustee, cannot waive the privilege of his predecessor in regard to communications made by the latter to the attorney while he was in office.<sup>2</sup> Where there are several clients, the communications made to their common attorney cannot be disclosed unless all of such clients consent thereto,<sup>3</sup> especially where such disclosure would be to their prejudice;<sup>4</sup> but this rule does not apply to a mere nominal party.<sup>5</sup> The mere fact that an attorney represents several persons having a common interest, or even charged with the commission of the same crime, does not, of itself, render the evidence of either of such clients, as to the communications made by him to such attorney, incompetent, where the client offers himself as a witness.<sup>6</sup>

172; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *Smith v. Crego*, 54 Hun 22, 7 N. Y. S. 86.

<sup>18</sup> *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353.

<sup>19</sup> *Lanum v. Patterson*, 151 Ill. App. 36; *Leyner v. Leyner*, 123 Ia. 185, 98 N. W. 628.

<sup>20</sup> *Holyoke v. Holyoke*, (Me.) 87 Atl. 40; *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *Ex p. Gfeller*, 178 Mo. 248, 77 S. W. 552.

N. Y. *Code Civ. Proc.* § 836, provides that the personal representative of a testatrix may waive the professional privilege of a medical witness, but makes no provision as to such a waiver of a witness disqualified as the attorney of a testator under section 835. *Wallace v. Wallace*, 137 N. Y. S. 43.

<sup>1</sup> *Fossler v. Schriber*, 38 Ill. 172; *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170; *Holyoke v. Holyoke*, (Me.) 87 Atl. 40; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406.

<sup>2</sup> *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

<sup>3</sup> *Rochevoucauld v. Boustead*, 74 L. T. N. S. (Eng.) 783; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Utica Bank v. Mersercau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Chahoon v. Com.*, 21 Gratt. (Va.) 822; *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922. See § 105.

<sup>4</sup> *Herpolsheimer v. Citizens' Ins. Co.*, 79 Neb. 685, 113 N. W. 152.

<sup>5</sup> *Allen v. Harrison*, 30 Vt. 219, 73 Am. Dec. 302.

<sup>6</sup> *People v. Patrick*, 182 N. Y. 131, 175, 74 N. E. 843.

§ 129. *Manner of Waiving Privilege Generally.*—The waiver of the rule as to privileged communications does not require any particular formality in order to be effective. It may either be express, or implied from the conduct of those who would be entitled to its benefit;<sup>7</sup> unless, of course, it is regulated by statute, as, for instance, in New York.<sup>8</sup> Thus where an attorney is called by the adverse party, and his client fails to object to questions calling for the disclosure of confidential communications, the privilege is lost; such inaction being deemed a waiver thereof.<sup>9</sup> One will not be permitted to speculate upon the evidence, and, finding it adverse to him, then move to exclude it.<sup>10</sup> Of course, when neither the form of the question, nor the preliminary answers of the witness, disclose the incompetency of the witness or his evidence, and the opposite party, as soon as it appears to him, promptly moves to exclude it, he is not in default.<sup>11</sup> Nor is it necessary to object specifically to every question, where the original objection properly raises the question of the competency of the witness.<sup>12</sup> It has also been held that when an attorney, who has been called as a witness, objects to certain questions on the ground that his answers thereto will necessitate the disclosure of communications made to him by his client in confidence, the attorney must be understood as making such objection on behalf of his client; and if the client stands by and does not release the witness from the obligation not to reveal the information, he must be understood to approve the objection and

<sup>7</sup> *Blackburn v. Crawford*, 3 Wall. 175, 18 U. S. (L. ed.) 186; *Glover v. Patten*, 165 U. S. 394, 17 S. Ct. 411, 41 U. S. (L. ed.) 760.

<sup>8</sup> *In New York*, under sec. 836 of the Code of Civil Procedure, the attorneys for the respective parties may, prior to trial, stipulate for the waiver of the privilege; but if not so stipulated for, such waiver can only be made in open court, on the trial of the action or proceeding. A paper executed by a party, prior to the trial,

providing for such waiver, is not sufficient.

<sup>9</sup> *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Brown v. Moosic Mountain Coal Co.*, 211 Pa. St. 579, 61 Atl. 76.

<sup>10</sup> *State v. Lehman*, 175 Mo. 619, 75 S. W. 139.

<sup>11</sup> *State v. Lehman*, 175 Mo. 619, 75 S. W. 139, *following State v. Foley*, 144 Mo. 618, 619, 46 S. W. 733.

<sup>12</sup> *Gabriel v. McMullin*, 127 Ia. 426, 103 N. W. 355.

to insist upon his privilege.<sup>13</sup> A waiver of protection against the disclosure of privileged communications may be withdrawn at any time before acted upon.<sup>14</sup> A contract entered into between client and attorney, for the purpose of binding the former, that the latter may at any time divulge information or knowledge acquired during the professional relation, is not a good waiver of the privilege of confidence and secrecy, and is void.<sup>15</sup>

§ 130. **Waiver by Giving Testimony.**—Where the client voluntarily testifies, as a witness, to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and he and his attorney may then be fully examined in relation thereto.<sup>16</sup> Thus it has been

<sup>13</sup> *Chew v. Farmers' Bank*, 2 Md. Ch. 231.

<sup>14</sup> *Herpolsheimer v. Citizens' Ins. Co.*, 79 Neb. 685, 113 N. W. 152.

Though a party, when testifying, said that he had no objection to an attorney, whom he had employed in the case, being called as a witness, an objection by that party's counsel to the attorney's testifying withdrew the consent, restoring the client's right, and rendering the attorney incompetent to testify. *Natlee Draft Horse Co. v. Marion Cripe & Co.*, 142 Ky. 810, 135 S. W. 292.

<sup>15</sup> *In re Boone*, 83 Fed. 944.

<sup>16</sup> *United States*.—*Hunt v. Blackburn*, 128 U. S. 464, 9 S. Ct. 125, 32 U. S. (L. ed.) 488.

*Alabama*.—*Eldridge v. State*, 126 Ala. 63, 28 So. 580.

*California*.—See *Tibbet v. Sue*, 125 Cal. 544, 58 Pac. 160; *Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258.

*Colorado*.—*Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819; *Sholine v. Harris*, 22 Colo. App. 63, 123 Pac. 330.

*Connecticut*.—*Pierce v. Norton*, 82 Conn. 441, 74 Atl. 686.

*Georgia*.—*Becker v. Shaw*, 120 Ga. 1003, 48 S. E. 408.

*Illinois*.—*Knight v. People*, 192 Ill. 170, 61 N. E. 371.

*Indiana*.—*Oliver v. Pate*, 43 Ind. 132.

*Iowa*.—*Kelly v. Cummins*, 143 Ia. 148, 20 Ann. Cas. 1283, 121 N. W. 540.

*Kansas*.—*Wilkins v. Moore*, 20 Kan. 538, *following State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

*Michigan*.—*Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

*Missouri*.—*Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621.

*Nebraska*.—*Cerny v. Paxton, etc.*, Co., 83 Neb. 88, 119 N. W. 14.

*New York*.—*People v. Patrick*, 182 N. Y. 131, 74 N. E. 843.

*Ohio*.—*King v. Barrett*, 11 Ohio St. 261.

*Oregon*.—*In re Young*, 59 Ore. 348, Ann. Cas. 1913B 1310, 116 Pac. 95, 1060.

*Texas*.—*Shelton v. Northern Texas Traction Co.* 32 Tex. Civ. App. 507, 75 S. W. 338; *Yardley v. State*, 50 Tex. Crim. 644, 100 S. W. 399, 123 Am. St. Rep. 869.



held that if the client, in his testimony, discloses anything in such confidential communications material to his side of the cause, then the other party has a right to all that was said in the same conversation, although it was said to the attorney and may injuriously affect the client's case;<sup>17</sup> and evidence to this effect may be introduced either in chief or for the purpose of impeachment;<sup>18</sup> thus the attorney may be called to rebut the evidence given by his client.<sup>19</sup> So, too, the privilege is waived where the client calls his attorney as a witness, and questions him as to the communications passing between them.<sup>20</sup> Such waiver, however, extends no farther than the subject-matter concerning which the attorney has been interrogated,<sup>1</sup> and if he has not been examined as to matters of privilege between him and his client, there is, of course, no waiver thereof.<sup>2</sup> A waiver also results where the client offers in evidence written communications received by him from his attorney;<sup>3</sup> or where a client calls his agent as a witness to testify to the communications made by such

*Utah*.—*State v. Hoben*, 36 Utah 186, 102 Pac. 1000.

*Washington*.—*Sanpere v. Sanpair*, 57 Wash. 524, 107 Pac. 369.

<sup>17</sup> *Young v. State*, 65 Ga. 525; *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333; *King v. Barrett*, 11 Ohio St. 261.

<sup>18</sup> *King v. Barrett*, 11 Ohio St. 261.

<sup>19</sup> *Eldridge v. State*, 126 Ala. 63, 28 So. 580.

<sup>20</sup> *United States*.—*Crittenden v. Strother*, 2 Cranch (C. C.) 464, 6 Fed. Cas. No. 3,394.

*Alabama*.—*Rowland v. Plummer*, 50 Ala. 182.

*California*.—*Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 Pac. 512.

*Hawaii*.—*Takamori v. Kanai*, 11 Hawaii 1.

*Illinois*.—*Fossler v. Schriber*, 38 Ill. 172.

*Massachusetts*.—*Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802.

*Attys. at L. Vol. I.*—15.

*Missouri*.—*Riddles v. Aikin*, 29 Mo. 453.

*New York*.—*Smith v. Crego*, 54 Hun 22, 7 N. Y. S. 86.

*North Carolina*.—*Jones v. Nantahala Marble, etc., Co.*, 137 N. C. 237, 49 S. E. 94.

*West Virginia*.—See *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

<sup>1</sup> *Landsberger v. Gorham*, 5 Cal. 450. See also *Vaillant v. Dodemead*, 2 Atk. (Eng.) 524.

<sup>2</sup> *Montgomery v. Pickering*, 116 Mass. 227; *Blount v. Kimpton*, 155 Mass. 378, 29 N. E. 590. 31 Am. St. Rep. 554; *Brown v. Brown*, 77 Neb. 125, 108 N. W. 180; *Tate v. Tate's Executor*, 75 Va. 522.

<sup>3</sup> *Western Union Tel. Co. v. Baltimore, etc., Tel. Co.*, 26 Fed. 55; *White v. Thacker*, 78 Fed. 862, 41 U. S. App. 745, 24 C. C. A. 374.

agent, to the attorney, while representing the client.<sup>4</sup> But the mere fact that a client is a witness in his own behalf, and testifies generally in the cause, does not operate as a waiver of his right to have the communications between himself and his attorney kept secret.<sup>5</sup> That a client on cross-examination testifies without objection that he had not made a certain statement to his attorney does not waive the privilege.<sup>6</sup> Nor does a client lose the benefit of the privilege where he is compelled, against his protest, to disclose such confidential statements.<sup>7</sup>

§ 131. **Waiver by Becoming State's Witness.** — It has been held that one charged with crime, who volunteers to testify for the prosecution, should be required to give a full and complete statement of all that he and his associates may have done or said, relative to the crime charged, no matter when or where done, or to whom said, and hence should not be allowed the benefit of the rule as to privileged communications;<sup>8</sup> the theory being that such witness, by going on the stand and acknowledging his participation in crime, waives the privilege to which he would otherwise be entitled.<sup>9</sup> This rule, however, has been disapproved in some jurisdictions; thus it has been held that the fact of a client having turned state's evidence does not render his attorney a competent witness, for the defense, as to the statements made to him by such client.<sup>10</sup>

<sup>4</sup> Louisville, etc., R. Co. v. Hill, 115 Ala. 334, 22 So. 163.

<sup>5</sup> State v. Barrows, 52 Conn. 323; Montgomery v. Pickering, 116 Mass. 227; Jones v. State, 65 Miss. 179, 3 So. 379; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362, *practically overruling* King v. Barrett, 11 Ohio St. 261; State v. James, 34 S. C. 49, 12 S. E. 657.

<sup>6</sup> Seaboard Air Line R. Co. v. Parker, (Fla.) 62 So. 589.

<sup>7</sup> People v. Cravath, 58 Misc. 154, 110 N. Y. S. 454.

<sup>8</sup> Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; People v. Gallagher, 75 Mich. 512, 42 N. W. 1063; Jones v. State, 65 Miss. 179, 3 So. 379. See also State v. Nelson, 91 Minn. 143, 97 N. W. 652; People v. Patrick, 182 N. Y. 131, 74 N. E. 843.

<sup>9</sup> People v. Gallagher, 75 Mich. 512, 42 N. W. 1063; People v. Patrick, 182 N. Y. 131, 74 N. E. 843.

<sup>10</sup> State v. James, 34 S. C. 49, 12 S. E. 657; Sutton v. State, 16 Tex. App. 490.

§ 132. **Effect of Waiver at Former Trial.** — The authorities are not agreed as to the effect of the waiver of a privileged communication at one trial, upon an offer to introduce the same evidence on a subsequent trial. Some cases hold that such a waiver cannot be recalled after it has been acted upon; and, therefore, a waiver at one trial would operate as a waiver of the same matter at a later trial.<sup>11</sup> But it has also been held that a waiver at one trial does not continue so as to be effective at a future trial of the same cause;<sup>12</sup> and again, that the waiver of a privileged communication may be withdrawn at any time before it has been acted on, where no advantage has accrued to either litigant on account thereof.<sup>13</sup> It is certain that the erroneous admission of evidence as to privileged communications at one trial will not entitle such evidence to be admitted at another trial.<sup>14</sup>

<sup>11</sup> *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956; *McKinney v. Grand St., etc.*, R. Co., 104 N. Y. 352, 10 N. E. 544; *Schlotterer v. Brooklyn, etc., Ferry Co.*, 89 App. Div. 508, 85 N. Y. S. 847. *Compare Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372.

<sup>12</sup> *Burgess v. Sims Drug Co.*, 114 Ia. 275, 86 N. W. 307, 89 Am. St. Rep.

359, 54 L.R.A. 364; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525, 45 N. W. 977; *Herpolsheimer v. Citizens' Ins. Co.*, 79 Neb. 685, 113 N. W. 152.

<sup>13</sup> *Herpolsheimer v. Citizens' Ins. Co.*, 79 Neb. 685, 113 N. W. 152.

<sup>14</sup> *Philadelphia F. Assoc. v. Fleming*, 78 Ga. 733, 3 S. E. 420.

## CHAPTER VII.

### RELATION OF ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEYS—IMPUTED NOTICE AND KNOWLEDGE.

#### *Creation of Relation.*

- § 133. Retainer.
- 134. Necessity of Retainer.
- 135. Sufficiency of Retainer.
- 136. Who May Employ Attorney.

#### *Termination of Relation.*

- 137. Generally.
- 138. By Act of Client.
- 139. By Act of Attorney.
- 140. By Death of Client.
- 141. By Death of Attorney.
- 142. By Accomplishment of Purpose.

#### *Substitution.*

- 143. Right to Substitution.
- 144. Substitution for Cause.
- 145. Substitution after Judgment.
- 146. Manner of Effecting Substitution.
- 147. Terms.
- 148. Determining Amount Due or Existence of Lien.
- 149. Notice of Substitution.
- 150. Effect of Substitution.

#### *Imputed Notice and Knowledge.*

- 151. General Rule.

#### *Creation of Relation.*

§ 133. Retainer. — The relation of attorney and client is created by the employment of an attorney to advise a client in relation to his rights, duties, or liabilities; or to try, or aid in trying, a cause wherein the client is a litigant. Engaging an

attorney in this manner is called a "retainer," the attorney being then said to be "retained" by the client who thus employs him.<sup>1</sup> General retainers have for their object the securing, beforehand, of the services of a particular attorney or counselor, for any emergency that may afterwards arise. They have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable.<sup>2</sup> A special retainer has reference to a particular case, or to a particular service. It, however, imposes obligations, *pro hac vice*, equally binding with those enjoined by a general

<sup>1</sup> Knight v. Russ, 77 Cal. 410, 19 Pac. 698; Blackman v. Webb, 38 Kan. 668, 17 Pac. 464; Blair v. Columbian Fireproofing Co., 191 Mass. 333, 77 N. E. 762.

The profession of attorney includes much more than the mere management of the prosecution and the defense of litigated cases. Com. v. Barton, 20 Pa. Super. Ct. 447.

"*Retainer*" Defined.—In Blackman v. Webb, 38 Kan. 668, 17 Pac. 464, the court, *per* Valentine, J., defined "retainer" as follows: "The act of employing or engaging an advocate, barrister, attorney, counselor, solicitor, or proctor to appear and prosecute or defend. The word is also used for the notice served by an attorney, etc., on the opposite party or attorney that he has been retained, in which use it is by elision for notice of retainer; and for the fee paid to a lawyer upon his undertaking a cause, in which use it is by elision for retaining fee." (Abb. L. Dict.) It will be seen that the word 'retainer' as used in cases of this kind means: First, the act of the client in employing his attorney or counsel; second, the notice of the retainer served upon the opposite party or his attorney; third, the retaining fee."

*Unlicensed Person Acting as Attorney*.—Where one assumed to act as the hired attorney of another, and the client had many consultations with the former as attorney, it was held that the relation of attorney and client existed, though the former had not then been admitted to practice. Sanguinetti v. Rossen, 12 Cal. App. 623, 107 Pac. 560.

<sup>2</sup> Agnew v. Walden, 84 Ala. 502, 4 So. 672.

In Hefferman v. Burt, 7 Ia. 320, 71 Am. Dec. 445, it was held that an attorney, when employed in anticipation of a suit, had as much power to bind his client before, as after, the suit had been commenced.

But in Stone v. Bank of Commerce, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028, the court said: "If before the commencement of any suit an attorney assumes to act for his principal it must be as agent and his actual authority must appear, and if it be not shown it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties."

retainer. It exacts undivided loyalty and allegiance to the client. In that particular service the attorney's talents and skill belong to his client. These he must bestow with all the zeal and earnestness of his nature, and in all the methods which truth and honesty can sanction.<sup>3</sup> When an attorney is retained to prosecute or defend an action, his entire services in that action are engaged for his client, whether he is ever called upon to perform services, or not.<sup>4</sup> He must give counsel whenever needed or called for, must acquaint himself with the case and its wants, must render all needed professional aid in the preparation of the case, and must give his earnest, unflagging attention and services to the trial when it comes. And in these several duties he must not relax in zeal until there is a judgment in the trial court, or other termination of the prosecution, unless, of course, the relation should, in some way, be terminated permanently.<sup>5</sup>

§ 134. *Necessity of Retainer.* — While every attorney regularly licensed, and duly admitted to practice, possesses a general license to appear in court for any suitors who may employ him, his license is not of itself an authority to appear for any particular person.<sup>6</sup> The relation of attorney and client can be created only by a contract of employment, express or implied,<sup>7</sup> and commences

<sup>3</sup> *Agnew v. Walden*, 84 Ala. 502, 4 So. 672.

<sup>4</sup> *Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464.

<sup>5</sup> *Agnew v. Walden*, 84 Ala. 502, 4 So. 672.

<sup>6</sup> *Cartwell v. Menifee*, 2 Ark. 356; *Clark v. Willett*, 35 Cal. 534; *People v. Mariposa Co.*, 39 Cal. 683; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

Counsel cannot be heard in the argument of a case for which he is not retained, unless retained in some case where a similar question arises, to which the adverse party in the case in hearing is also a party. *Nauer v. Thomas*, 13 Allen (Mass.) 572.

*Two Attorneys Claiming to Be Retained.*—Where two inconsistent answers are filed in a case by two attorneys, both of whom claim to represent the defendant, the court must first determine which of the attorneys is the defendant's lawful attorney, and it is error to allow both answers to remain on file and to go to trial on any issue over plaintiff's objection. *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806.

<sup>7</sup> *Alabama.*—*Milligan v. Alabama Fertilizer Co.*, 89 Ala. 322, 7 So. 650.

*Illinois.*—*De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Ray v. Lobdell*, 213 Ill. 389, 72 N. E. 1076, *affirming*

only when such a contract has been entered into.<sup>8</sup> That one acted as attorney, and was considered as such by the opposite party, is not enough to show a retainer.<sup>9</sup>

**§ 135. Sufficiency of Retainer.**—The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business.<sup>10</sup> The formal, and undoubtedly the better, way is to have the contract of employment reduced to writing; and all careful practitioners, as well as careful clients, adopt this method when they can. Even though the circumstances surrounding the original employment of counsel are such as to render the procurement of a written agreement impracticable, such an agreement should be entered into as soon as conditions permit. The contract should

110 Ill. App. 230; *Francisco v. Dove*, 231 Ill. 402, 83 N. E. 205.

*Iowa*.—*Bowen v. Aetna Indemnity Co.*, 151 Ia. 663, 131 N. W. 1086.

*Kansas*.—*Caldwell v. Bigger*, 76 Kan. 49, 90 Pac. 1095.

*Kentucky*.—*Hay v. Cole*, 11 B. Mon. 70.

*Louisiana*.—*Cooley v. Cecile*, 8 La. Ann. 51.

*Mississippi*.—*McCreary v. Hoopes*, 25 Miss. 428.

*Missouri*.—*State v. Hedgepeth*, 125 Mo. 14, 28 S. W. 160.

*New York*.—*Burghart v. Gardner*, 3 Barb. 64; *Hoover v. Greenbaum*, 61 N. Y. 305; *Whitesell v. New Jersey & H. R. R. & F. Co.*, 68 App. Div. 82, 74 N. Y. S. 217; *In re Malcom*, 129 App. Div. 226, 113 N. Y. S. 666, *reversing* 60 Misc. 324, 113 N. Y. S. 255.

*Pennsylvania*.—*Stout Coal Co. v. O'Donnell*, 4 Kulp 495.

*South Carolina*.—*Ex p. Lynch*, 25 S. C. 193.

*Texas*.—*Smith v. Smith*, 23 Tex. Civ. App. 204, 55 S. W. 541.

<sup>8</sup> *Stone v. Bank of Commerce*, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028; *Dentzel v. City, etc., R. Co.*, 90 Md. 434, 45 Atl. 201; *Keenan v. Scott*, 64 W. Va. 142, 61 S. E. 806.

<sup>9</sup> *Hotchkiss v. LeRoy*, 9 Johns. (N. Y.) 142.

*It is a question of fact* for the jury whether one who has been accustomed to take judgments for a party is authorized to act as his attorney in a given case, as in indorsing a writ and directing a sheriff's levy. *Alspaugh v. Jones*, 64 N. C. 29.

The fact that an attorney received from the sheriff the surplus upon an execution sale, after satisfaction of the judgment, does not establish the relation of attorney and client between him and the judgment debtor, it appearing that there was nothing in the transaction requiring the advice or opinion of an attorney. *McCreary v. Hoopes*, 25 Miss. 428.

<sup>10</sup> *Detroit v. Whittemore*, 27 Mich. 281.

particularly specify the services required, the sum to be paid therefor, and the conditions, if any, upon which performance depends; but no greater formality is required than in the case of any other contract,<sup>11</sup> excepting where a power of attorney is required. Such a document must, of course, be drawn in accordance with the usual formalities with respect to the powers granted, execution, and acknowledgment.<sup>12</sup> But there is no actual necessity of a written agreement. An attorney may be employed, and the relation of attorney and client established, just as effectively by an oral agreement.<sup>13</sup> As soon as the client has expressed a desire to employ an attorney, and there has been a consent by the attorney to act for him, the relation of attorney and client has been established.<sup>14</sup> Nor need there be an express agreement to employ an attorney;<sup>15</sup> a sufficient employment may be implied from the facts and circumstances of the case.<sup>16</sup> Thus the employment may

<sup>11</sup> See *Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523.

"Yet it is still strongly recommended to attorneys for their own protection and character, to obtain from their clients written authority to sue or defend, in order that the same may be the more easily susceptible of proof." *State v. Houston*, 3 Harr. (Del.) 15.

*Construction of Retainer.*—Where the contract of retainer is so badly expressed that it was not easy to gather just what it meant, but it appeared that it was dictated by the defendant himself, a lawyer, and that the plaintiff could not read English, and knew nothing about what she signed, except as defendant explained it to her, it was held that the plaintiff was entitled to the most favorable reading of which the language was capable. *Harkavy v. Zisman*, 96 N. Y. S. 214.

<sup>12</sup> See *Wright v. Ellison*, 1 Wall. 16, 17 U. S. (L. ed.) 555; *Newberne v. Jones*, 63 N. C. 606.

<sup>13</sup> *Smith v. Black*, 51 Md. 247.

<sup>14</sup> *In re Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; *Smith v. Black*, 51 Md. 247; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

<sup>15</sup> *Hallam v. Bardsley*, 7 Ky. L. Rep. 516.

<sup>16</sup> *Blyth v. Fladgate*, [1891] 1 Ch. (Eng.) 337; *Cooper v. Hamilton*, 52 Ill. 122; *Burnham v. Roberts*, 70 Ill. 19; *Franklin County v. Layman*, 145 Ill. 138, 33 N. E. 1094; *Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464; *Perry v. Lord*, 111 Mass. 504; *McCurdy v. New York L. Ins. Co.*, 115 Mich. 20, 72 N. W. 996; *Keenan v. Scott*, 64 W. Va. 142, 61 S. E. 806.

"The payment of a fee is the most usual and weighty item of evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation; but whether payment



be established by the correspondence of the parties;<sup>17</sup> or by knowingly accepting the services of an attorney,<sup>18</sup> even though such attorney was not actually employed,<sup>19</sup> or paid, by the beneficiary of his labors,<sup>20</sup> or by facts constituting an estoppel.<sup>21</sup> So, the relation of attorney and client may be established by consulting with, and being advised by, counsel;<sup>1</sup> or by employing, directing, or

is made in part or in whole by retainer in advance is not material. Nor is it even indispensable that the compensation should be assumed by the client. Ordinarily it is so from the nature of the employment, which in the vast majority of cases involves the guarding or enforcement of the client's interest against an adverse one, and is therefore exclusive. But even adverse interests if to be amicably adjusted may be represented by the same counsel, though the cases in which this can be done are exceptional and never entirely free from danger of conflicting duties." *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 602.

<sup>17</sup> *Orr v. Brown*, 69 Fed. 216, 30 U. S. App. 405, 16 C. C. A. 197; *Clark v. Lilliebridge*, 45 Kan. 567, 26 Pac. 43; *Hardesty's Succession*, Mann. Unrep. Cas. (La.) 111; *Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347; *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200.

<sup>18</sup> *United States*.—*Central Trust Co. v. Ingersoll*, 87 Fed. 427, 59 U. S. App. 242, 31 C. C. A. 41.

*Connecticut*.—*Newton v. Hamden*, 79 Conn. 237, 64 Atl. 229.

*Georgia*.—*Hood v. Ware*, 34 Ga. 328.

*Iowa*.—*Oltrogge v. Schutte*, 51 Ia. 279, 1 N. W. 544; *Plank v. Hertha*, 132 Ia. 213, 109 N. W. 732.

*Kentucky*.—*Hallam v. Bardsley*, 7 Ky. L. Rep. 516.

*Maryland*.—*Ward v. Koenig*, 106 Md. 433, 67 Atl. 236.

*Michigan*.—*McCurdy v. New York L. Ins. Co.*, 115 Mich. 20, 72 N. W. 996, 4 Detroit Leg. N. 738.

*New Hampshire*.—*Goodall v. Bedel*, 20 N. H. 205; *Stevens v. Reed*, 37 N. H. 49.

*New York*.—*Watrous v. Kearney*, 11 Hun 584; *Bogardus v. Livingston*, 7 Abb. Pr. 428.

A county board orally agreed with an attorney to retain him in certain contemplated litigation, and promised to enter this agreement in their records, but failed to do so. The attorney had previously been retained by the board in a written agreement for the services under which he was paid. The attorney having rendered the services contemplated under the oral agreement, it was held that the county could not avoid liability therefor on the ground that the retainer was not in writing; it could not thus take advantage of its own wrong. *Franklin County v. Layman*, 145 Ill. 138, 33 N. E. 1094.

<sup>19</sup> *Plank v. Hertha*, 132 Ia. 213, 109 N. W. 732.

<sup>20</sup> *Page v. Trutch*, 3 N. Y. Wkly. Dig. 167.

<sup>21</sup> *Kelly v. Ning Yung Benev. Assoc.*, 2 Cal. App. 460, 84 Pac. 321.

<sup>1</sup> *Perkins v. West Coast Lumber Co.*, 129 Cal. 427, 62 Pac. 57; *Ryan v. Long*, 35 Minn. 394, 29 N. W. 51; *Severance v. Bizallion*, 67 Misc. 103,

requesting an attorney to perform professional services.<sup>2</sup> But the relation of attorney and client does not necessarily result from the performance of gratuitous services.<sup>3</sup> After the relationship of attorney and client has begun, any subsequent changes in the agreement as to compensation or as to the property out of which compensation is to come will not affect the relationship.<sup>4</sup> The necessity of proving employment, and the evidence thereof, are considered in connection with actions for compensation.<sup>5</sup>

**§ 136. Who May Employ Attorney.** — Anyone who is capable of entering into contractual relations with another, may employ an attorney.<sup>6</sup> So, one having authority to do so, may, as

121 N. Y. S. 627; *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. S. 862; *Fore v. Chandler*, 24 Tex. 146.

<sup>2</sup> *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; *Arnold v. Robertson*, 3 Daly (N. Y.) 298.

*Compare Norwood v. Barcalow*, 6 Daly (N. Y.) 117, wherein it appears that on defendant's application to a bank for a loan secured by a real estate mortgage, he was promised the loan provided his title proved satisfactory. The bank referred defendant to its regular attorneys, with whom he left his muniments of title. The attorneys examined the title, and rejected it, and it was held that the relation of attorney and client was not thereby raised, so as to charge defendant with fees for the examination of his title.

<sup>3</sup> Thus it has been held that the fact that an attorney performed services without compensation, does not show that he was not authorized to act for his client. *Packard v. Delfel*, 9 Wash. 562, 38 Pac. 208.

But where one of the parties to a

contract is an attorney, and he offers to, and does, draw the necessary papers free of charge, that fact does not establish the relationship of attorney and client between them, or impose upon the attorney the duties and obligations of that relationship. *Stout v. Smith*, 98 N. Y. 25, 50 Am. Rep. 632.

<sup>4</sup> *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

<sup>5</sup> See *infra*, §§ 507, 508.

<sup>6</sup> *Interveners May Employ Counsel.* — A court, in granting a motion to permit parties to intervene as defendants, has no authority to require them to appear and defend through the attorney employed by the original defendant. *O'Connor v. Hendrick*, 90 App. Div. 432, 86 N. Y. S. 1.

*Members of a city council* are entitled to employ their own private counsel to defend them on their appeal from an order in mandamus against the council, affecting them personally as to costs, and need not depend on the city's corporation counsel by whom they should appear as a board. *People v. Guggenheimer*, 29 Misc. 553, 61 N. Y. S. 961.

the agent of another, employ counsel on behalf of his principal; <sup>7</sup> in such case, however, there is no relation of attorney and client between the attorney and the agent.<sup>8</sup> So, it seems, one of several defendants, sued on a joint contract, all of whom are duly served with process, may employ an attorney to conduct the suit on behalf of all. This is on the ground of implied authority.<sup>9</sup> It is clear, of course, that in the absence of express or implied authority, one person cannot employ counsel to act for another.<sup>10</sup> Thus an attorney employed to defend the rights of one joint mortgagee, is not authorized to appear and defend for the other joint mortgagee.<sup>11</sup> Nor does the institution by an elector of proceedings to contest an election, create the relation of attorney and client between the attorney appearing therein, and a candidate who did not advise a suit and who was not consulted with reference to it.<sup>12</sup> There is no question as to the right of persons acting in a fiduciary, or other representative capacity, to employ counsel in the interest of those whom they represent; thus as to executors, administrators, guardians, trustees, committees, etc., when there is any occasion for legal advice or aid. In all such cases the question usually involved is the right to charge the persons represented with counsel fees, and the amount thereof. In so far as these matters are relevant to this work, they have been considered in connection with the subject of compensation.<sup>13</sup> A witness, as such, cannot have an attorney; and though an accomplice may act by advice of his attorney as to whether he will become a witness for the prosecution, when he once becomes such a witness, the relation of attorney and client ceases *quoad hoc*.<sup>14</sup>

<sup>7</sup> Garrison v. McGowan, 48 Cal. 592; Pittsburgh, etc., R. Co. v. Woolley, 12 Bush (Ky.) 451; Howard v. Howard, 11 How. Pr. (N. Y.) 80.

An agent's act in sending process served on his principal to attorneys "for such action as they may deem necessary" in contemplated litigation, amounts to a retainer of such attorneys for the principal. Toplitz v. Meyer, 34 Misc. 786, 69 N. Y. S. 849; Swartz v. Morgan, 163 Pa. St. 195, 29 Atl. 974, 43 Am. St. Rep.

786; Fowler v. Iowa Land Co., 18 S. D. 131, 99 N. W. 1095.

<sup>8</sup> Porter v. Peckham, 44 Cal. 204.

<sup>9</sup> Whitney v. Silver, 22 Vt. 634.

<sup>10</sup> Fayette County v. Chitwood, 8 Ind. 504; Cass County v. Ross, 46 Ind. 404; Bradley v. Welch, 100 Mo. 258, 12 S. W. 911.

<sup>11</sup> Bowen v. Wood, 35 Ind. 268.

<sup>12</sup> Hersleb v. Moss, 28 Ind. 354.

<sup>13</sup> See *infra*, §§ 509-515.

<sup>14</sup> Wight v. Rindskopf, 43 Wis. 344.

*Termination of Relation.*

§ 137. **Generally.**—In addition to the causes specified in the other sections of this subdivision, the relation of attorney and client will be severed by the disability of the attorney to perform the duties assumed by him; thus as to disability caused by illness,<sup>15</sup> disbarment,<sup>16</sup> or removal from the state; but, notwithstanding his removal from the state, an attorney continues to represent his client in actions previously commenced until another has been substituted in his place;<sup>17</sup> and the fact that one of the members of a firm permanently removes from the state, does not prevent the remaining partner from continuing the employment.<sup>18</sup> The mere fact of the dissolution of a law firm does not of itself dissolve the agency of each member;<sup>19</sup> and the client may look to each of them for the performance of a duty confided to them.<sup>20</sup> The relation of attorney and client may be terminated by the dissolution of a partnership which employed the attorney,<sup>1</sup> or by the insanity of the client,<sup>2</sup> or by war;<sup>3</sup> but war does not necessarily dissolve or suspend the relation of attorney and client.<sup>4</sup>

<sup>15</sup> *Corson v. Lewis*, 77 Neb. 446, 109 N. W. 735.

<sup>16</sup> *Moyers v. Graham*, 15 Lea (Tenn.) 57.

See *infra*, § 703.

<sup>17</sup> *Faughnan v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212.

<sup>18</sup> *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

<sup>19</sup> *Downs v. Allen*, 22 Fed. 805.

<sup>20</sup> *McCoon v. Galbraith*, 29 Pa. St. 293. See also *supra*, § 141.

<sup>1</sup> *Lochrane v. Stewart*, (Ky.) 2 S. W. 903.

<sup>2</sup> *Chase v. Chase*, 163 Ind. 178, 71 N. E. 485.

But see *McKenna v. Garvey*, 191 Mass. 96, 77 N. E. 782, holding that where, pending proceedings for the probate of a will and the appointment

of an executor, petitioner became insane, but no other adjudication of insanity than mere commitment to a hospital was shown, the relation of attorney and client existing between petitioner and his attorney of record continued as to all matters included in the original contract of employment, notwithstanding such alleged insanity.

<sup>3</sup> *Harper v. Harvey*, 4 W. Va. 539, wherein it was held that the relation of attorney and client ceased, or was suspended, when the former went into the lines of the Confederate States, and that no payment to him would be good.

<sup>4</sup> *Rice v. O'Keefe*, 6 Heisk. (Tenn.) 638.

§ 138. **By Act of Client.**—A client may revoke the authority of his attorney at any time with or without cause,<sup>5</sup> even where

<sup>5</sup> *United States*.—*Isaacs v. Abraham*, 6 Rep. 737, 13 Fed. Cas. No. 7,094; *Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958; *Wilkinson v. Tilden*, 21 Blatchf. 192; *In re Paschal*, 10 Wall. 483, 20 U. S. (L. ed.) 992; *In re Wilson*, 12 Fed. 235; *Ronald v. Mutual Reserve Fund L. Assoc.* 30 Fed. 228; *Du Bois v. New York*, 134 Fed. 570, 69 C. C. A. 112; *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382.

*Alabama*.—*Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

*California*.—*Faulkner v. Hendy*, 99 Cal. 172, 33 Pac. 899; *Lee v. Superior Ct.*, 112 Cal. 354, 44 Pac. 666; *Woodbury v. Nevada Southern R. Co.*, 121 Cal. 165, 53 Pac. 450; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581.

*Delaware*.—*Gibbons v. Gibbons*, 4 Harr. 105.

*District of Columbia*.—*Kappler v. Sumpter*, 33 App. Cas. 404.

*Illinois*.—*Lynch v. Lynch*, 99 Ill. App. 454.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Root v. McIlvaine*, 56 S. W. 498; *O'Neal v. Spalding*, 66 S. W. 11; *Joseph v. Lapp*, 78 S. W. 1119.

*Louisiana*.—*Louque v. Dejan*, 129 La. 519, 56 So. 427, 38 L.R.A. (N.S.) 389.

*Maine*.—*White v. Johnson*, 67 Me. 287.

*Michigan*.—*Brown v. Brown*, How. N. P. 94.

*New Hampshire*.—*Wells v. Hatch*, 43 N. H. 246.

*New Jersey*.—*Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638.

*New York*.—*Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Jeffards v. Brooklyn Heights R. Co.*, 49 App. Div. 45, 63 N. Y. S. 530; *Matter of Mitchell*, 57 App. Div. 22, 67 N. Y. S. 961; *Yuengling v. Betz*, 58 App. Div. 8, 68 N. Y. S. 574; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *O'Connor v. Hendrick*, 90 App. Div. 432, 86 N. Y. S. 1; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. S. 1059; *People v. Federal Bank*, 114 App. Div. 374, 100 N. Y. S. 44; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 862; *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. S. 1106; *Matter of Prospect Ave.*, 85 Hun 257, 32 N. Y. S. 1013; *O'Sullivan v. Metropolitan St. R. Co.*, 39 Misc. 268, 79 N. Y. S. 481; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. S. 151; *Gardner v. Tyler*, 5 Abb. Pr. N. S. 33; *Trust v. Repoor*, 15 How. Pr. 570; *Prentiss v. Livingston*, 60 How. Pr. 380; *Ogden v. Devlin*, 45 Super. Ct. 631; *Hunt's Estate*, Tuck. 55.

*North Dakota*.—*Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866.

*Pennsylvania*.—*Com. v. Terry*, 11 Pa. Super. Ct. 547; *Schafer's Estate*, 39 Pa. Super. Ct. 384.

*Tennessee*.—*Yoakley v. Hawley*, 5 Lea 670; *Moyers v. Graham*, 15 Lea 57.

*Texas*.—*Arrington v. Sneed*, 18 Tex. 135.

*Utah*.—*Sandberg v. Victor Gold, etc., Min. Co.*, 18 Utah 66, 55 Pac. 74.

the fee is contingent,<sup>6</sup> and subject only to a liability for the services rendered.<sup>7</sup> No special formality is required to effect the discharge,<sup>8</sup> unless, of course, the relation was created by a power of attorney.<sup>9</sup> Indeed, the right of a client to so discharge his attorney is practically indispensable in view of the delicate and confidential relations which exist between attorney and client, and of the evil to the client's interests, engendered by friction or

*Wyoming.*—*Sheridan County v. Hanna*, 9 Wyo. 368, 63 Pac. 1054.

Where one of several heirs procured from the other heirs a power of attorney to act for them in a proposed suit to recover land, his discharge of an attorney employed by him to bring the suit does not deprive such attorney of the right to bring the action under a contract subsequently made by him with one or more of the other heirs. *Spears v. Ray*, 49 S. W. 535, 20 Ky. L. Rep. 1462.

<sup>6</sup> *Joseph v. Lapp*, 78 S. W. 1119, 25 Ky. L. Rep. 1875; *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L.R.A.(N.S.) 1215.

In *Ronald v. Mutual Reserve Fund L. Assoc.*, 30 Fed. 228, the court said: "Contracts like that in the present instance, for the compensation of attorneys to be paid from the amount recovered, and contingent upon a recovery, are not to be construed as debarring a plaintiff from any change of attorney, nor as giving the original attorney an absolute control of the litigation to the end. Such a construction would be impolitic in its results, and cannot be sustained. The agreement should be regarded as providing for the mode of compensation only, and subject to such reasonable changes and provisions as subsequent circumstances may make proper."

<sup>7</sup> See *infra*, § 456. See also In re

*Robbins*, 61 Misc. 114, 112 N. Y. S. 1032, affirmed, 132 App. Div. 905, 116 N. Y. S. 1146; *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866.

In *State v. District Ct.*, 30 Mont. 8, 75 Pac. 516, it was held that the guardian of an incompetent person was entitled to have the attorney who acted for the incompetent before the guardian's appointment changed, although no payment of the fees of the attorney discharged had been made.

<sup>8</sup> *Schafer's Estate*, 39 Pa. Super. Ct. 384.

Where a client wrote to his attorney, "I am forced . . . to ask you to take no further part in the case, but to leave it to me," it was held that whether or not, as a general rule, an order of court is necessary to terminate the relation of attorney and client, the request above stated must be regarded as taking the cause out of control of the attorney, and as absolutely discharging him. *Ryan v. Martin*, 18 Wis. 672.

<sup>9</sup> Where a licensed attorney holds a recorded power of attorney from his client, to appear for him before all courts to prosecute and defend all suits as occasion shall require, the authority cannot be terminated by private letters of the client to a third person. *Girard v. Hirsch*, 6 La. Ann. 651.

distrust.<sup>10</sup> Nor can the general right of the client to discharge his attorney be affected by any previous arrangement subsisting between them.<sup>11</sup> Upon the attorney's discharge the rights and duties of the parties as attorney and client cease.<sup>12</sup> Whether a discharge was with, or without, cause bears only on the right of the attorney to compensation, and the amount thereof; and this feature of the question will be considered in that connection.<sup>13</sup> As to what constitutes a sufficient cause for the discharge of an attorney by his client, although no hard and fast rule can be laid down, it may be said generally that, the relation of attorney and client being one of mutual trust, confidence, and good will, any conduct on the part of the attorney which must necessarily put an end to these justifies the client in terminating the relation.<sup>14</sup> Thus cause for discharge has been said to exist where an attorney, under contract to render services for his client, fails to pay over on demand the amount due the client under the contract.<sup>15</sup> So, the bringing of a suit by an attorney for fees before the completion of his services, will justify the client in discharging him.<sup>16</sup> Where the attorney, whose discharge is desired, appears as coun-

<sup>10</sup> *Wilkinson v. Tilden*, 21 Blatchf. (U. S.) 192; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *In re Dunn*, 205 N. Y. 398, 98 N. E. 914.

<sup>11</sup> *In re Paschal*, 10 Wall. 483, 20 U. S. (L. ed.) 992; *Carver's Case*, 7 Ct. Cl. 499; *People v. Norton*, 16 Cal. 436; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 862; as, for example, an arrangement for a contingent fee, *Root v. McIlvaine*, (Ky.) 56 S. W. 498; *Breathitt Coal, etc., Co. v. Gregory*, (Ky.) 78 S. W. 148; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. S. 1059.

<sup>12</sup> *Lynch v. Lynch*, 99 Ill. App. 454; *Wells v. Hatch*, 43 N. H. 246; *Riebold v. Hartzell*, 23 N. D. 264, 136 N. W. 247.

<sup>13</sup> See *infra*, § 451.

<sup>14</sup> *Arrington v. Sneed*, 18 Tex. 135.

It is a good cause for terminating a contract by which an attorney was employed so long as his services should be satisfactory, that the relation between the attorney and the managing officer of the client (a corporation) has become strained, and that each entertains feelings of distrust and ill will towards the other. *Price v. Western Loan, etc., Co.*, 35 Utah 379, 19 Ann. Cas. 589, 100 Pac. 677.

Where a party deems his attorney to have improperly acted, he should move immediately to dismiss him, and not wait until the attorney has procured further evidence and prepared the case for trial. *The Zilpha*, 40 Ct. Cl. 200.

<sup>15</sup> *Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112.

<sup>16</sup> *Arrington v. Sneed*, 18 Tex. 135.

sel of record in pending litigation, and it is necessary to substitute other counsel in his stead, it is absolutely necessary in many jurisdictions, and usual and proper in all, to apply to the court, wherein such litigation is pending, for permission to make such substitution, whereupon an order will be entered as the facts may warrant.<sup>17</sup> So, also, counsel appointed by the court,<sup>18</sup> or by officers created by the court, such as receivers, should not, as a general rule, be discharged without the court's consent. Thus where a receiver of an insolvent corporation was acting for the benefit of the creditors, it was held that the right of the receiver to make a change of attorneys did not rest entirely upon his volition, but that the court had the right to examine the reasons for the contemplated change, and to determine how it would affect the interests of the beneficiaries for whom the receiver was acting; the distinction between receivers and ordinary clients resting upon the fact that the receiver was in fact at all times subject to the direction of the court in the performance of his duties as such, and that the court might even control the selection of his counsel should it become proper to do so.<sup>19</sup> But where the receiver for a national bank, who was plaintiff in a number of cases brought for the collection of claims, petitioned for the exclusion of the attorney of record (one not appointed by the receiver) in such cases from further appearance therein, the court said: "Consideration for the rights of the parties whose interests are represented by this receiver requires me to hold that in all pending cases in which further proceedings or some further action of the court may be necessary, the receiver has the right to dismiss his attorney at pleasure after payment of lawful charges for services rendered, and to employ a new attorney to conduct such further proceedings without assigning any reason for his action."<sup>20</sup> An attorney is of course entitled to notice of his discharge,<sup>1</sup> but it need not be formal, any act being sufficient which shows an intention to sever the relation.<sup>2</sup> So, also, parties dealing with an

<sup>17</sup> See *infra*, § 146.

<sup>18</sup> *Attorneys appointed by the court* to defend absent heirs and legatees should not be arbitrarily discharged. *Lee v. Superior Court*, 112 Cal. 354, 44 Pac. 666.

<sup>19</sup> *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486.

<sup>20</sup> *In re Herman*, 50 Fed. 517.

<sup>1</sup> *Arrington v. Sneed*, 18 Tex. 135.

<sup>2</sup> *Schafer's Estate*, 39 Pa. Super. Ct. 384.



attorney will not be affected by the revocation of his authority unless they have notice thereof.<sup>3</sup> So long as the client permits one to remain his attorney of record, he is bound by any act which by virtue of the retainer the attorney was authorized to do, as against persons ignorant, without fault on their part, of the attorney's discharge.<sup>4</sup> The acquiescence of a client in an attorney continuing to act for him, is equivalent to the withdrawal of a previous notification that he would no longer be represented by such attorney.<sup>5</sup> A party who moves to dismiss his attorney becomes chargeable with notice of what may be done in the case, and should appear when it is regularly reached on the calendar if he does not wish his attorney to act then.<sup>6</sup>

**§ 139. By Act of Attorney.**—An attorney who has been employed generally to conduct legal proceedings enters into an entire contract to conduct them to their termination; and he cannot abandon the service<sup>7</sup> to his client's detriment;<sup>8</sup> and this is true even though the attorney, subsequently to his employment,

The institution of an action to enjoin an attorney from collecting a judgment, is sufficient notice of his discharge. *O'Neal v. Spalding*, 66 S. W. 11, 23 Ky. L. Rep. 1729.

<sup>3</sup> *White v. Johnson*, 67 Me. 290; *Acock v. McBroom*, 38 Mo. 342; *Schelly v. Zink*, 13 Hun (N. Y.) 538; *Butcher v. Quinn*, 86 App. Div. 391, 83 N. Y. S. 700.

<sup>4</sup> *Wells v. Hatch*, 43 N. H. 246; *Beli-veau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L.R.A. 167; *Butcher v. Quinn*, 86 App. Div. 391, 83 N. Y. S. 700; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

An attorney of record in a cause is entitled to receive payment of a judgment recovered therein, and those dealing with such attorney will not be affected by a revocation of his authority if they have had no notice of

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that fact. *Acock v. McBroom*, 38 Mo. 342.

<sup>5</sup> *Steinson v. Board of Education*, 76 App. Div. 612, 78 N. Y. S. 703.

<sup>6</sup> *The Zilpha*, 40 Ct. Cl. 200.

<sup>7</sup> *United States*.—*U. S. v. Curry*, 6 How. 106, 12 U. S. (L. ed.) 363.

*Massachusetts*.—*Powers v. Manning*, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

*Missouri*.—*Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17.

*New York*.—*Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263.

*Tennessee*.—*Love v. Hall*, 3 Yerg. 408.

<sup>8</sup> *Heller v. Waller*, 2 Kulp (Pa.) 334; *Love v. Hall*, 3 Yerg. (Tenn.) 408. See also *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17; *Pickard v. Pickard*, 83 Hun 338, 31 N. Y. S. 987.

was elected an officer of a municipal corporation against which his client's action was pending.<sup>9</sup> Where an attorney has appeared in an action his relation to his client can only be terminated by his withdrawal of record<sup>10</sup> by leave of court.<sup>11</sup> Usually he has a right to withdraw with his client's consent;<sup>12</sup> but without such consent, withdrawal will only be permitted for justifiable cause.<sup>13</sup> The withdrawal of an attorney's appearance is justified only when the cause therefor is substantial,<sup>14</sup> such as the client's refusal or neglect to pay the fees agreed upon,<sup>15</sup> or to make reasonable ad-

<sup>9</sup> *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298.

<sup>10</sup> *Roush v. Fort*, 3 Mont. 175.

<sup>11</sup> *U. S. v. Curry*, 6 How. 106, 12 U. S. (L. ed) 363; *Krieger v. Krieger*, 221 Ill. 479, 77 N. E. 909, reversing 120 Ill. App. 634, and affirming 121 Ill. App. 11; *Chicago Pub. Stock Exch. v. McClaughry*, 50 Ill. App. 358; *Hickox v. Fels*, 86 Ill. App. 216; *Symmes v. Major*, 21 Ind. 443; *Branch v. Walker*, 92 N. C. 87.

<sup>12</sup> *Thompson v. Dickinson*, 159 Mass. 210, 34 N. E. 262.

The withdrawal of his appearance by an attorney on leave of court, is presumed to have been authorized by the client. *Henck v. Todhunter*, 7 Har. & J. (Md.) 275, 16 Am. Dec. 300.

<sup>13</sup> *Hawkes v. Cottrell*, 3 H. & N. (Eng.) 243, 27 L. J. Exch. 369; *Powers v. Manning*, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258; *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17; *Tenney v. Berger*, 48 Super. Ct. (N. Y.) 11.

<sup>14</sup> *Eliot v. Lawton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683.

<sup>15</sup> *United States v. Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439; *Chambers v. Gilmore*, 193 Fed. 635, 113 C. C. A. 503.

*Arkansas v. LaCotts v. Quertermous*, 84 Ark. 376, 105 S. W. 872.

*Illinois*.—See *Cairo, etc., R. Co. v. Koerner*, 3 Ill. App. 248.

*Iowa*.—*Cullison v. Lindsay*, 108 Ia. 124, 78 N. W. 847.

*Louisiana*.—*Cooley v. Doherty*, 5 La. Ann. 163.

*Massachusetts*.—*Eliot v. Lawton*, 7 Allen 274, 83 Am. Dec. 683.

*Missouri*.—*Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458; *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17.

*New York*.—*Gleason v. Clark*, 9 Cow. 57; *Castro v. Bennet*, 2 Johns. 296; *Pickard v. Pickard*, 83 Hun 338, 31 N. Y. S. 987; *Clark v. Nichols*, 127 App. Div. 219, 111 N. Y. S. 66; *Herbert v. Lawrence*, 21 Civ. Pro. 336, 18 N. Y. S. 95; *Avery v. Jacob*, 59 Super. Ct. 585 mem., 15 N. Y. S. 564.

*Texas*.—*Thomas v. Morrison*, 46 S. W. 46.

In *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458, it was held that the plaintiff had a right to quit the services of the defendant, as attorney in a criminal prosecution, when the defendant attempted to modify their contract so as to limit the plaintiff to a fee, contingent upon the defendant's being finally discharged. See also *Cullison v. Lindsay*, 108 Ia. 124, 78 N. W. 847.

An attorney is not justified in with-

vances for expenses and to apply on account of fees,<sup>16</sup> or attempts to prevent his attorney from collecting his fees,<sup>17</sup> or where he learns that his client's claim is fictitious,<sup>18</sup> or that continuing in the employment would oblige him to represent conflicting interests,<sup>19</sup> or where the client, against the protest of his attorney, introduces into the proceeding, as counsel, one against whom the attorney has objections both personally and professionally;<sup>20</sup> though the mere fact of the client's employing another attorney, as associate in the case, does not justify the original attorney in withdrawing, where no reasonable objection can be made to such associate.<sup>1</sup> So,

drawing from a case merely because his client refuses to pay some demand pertaining to another proceeding. *Cairo, etc., R. Co. v. Koerner*, 3 Ill. App. 248. See also *Halbert v. Gibbs*, 16 App. Div. 126, 4 N. Y. Ann. Cas. 232, 45 N. Y. S. 113.

<sup>16</sup> *England*.—*Robins v. Goldingham*, L. R. 13 Eq. 440, 41 L. J. Ch. 813, 25 L. T. N. S. 900, 20 W. R. 277; *Hoby v. Built*, 3 B. & Ad. 350, 23 E. C. L. 91, 1 L. J. K. B. 121; *Underwood v. Lewis*, [1894] 2 Q. B. 306, 42 W. R. 517, 9 Rep. 440; *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Vansandau v. Browne*, 9 Bing. 402, 23 E. C. L. 315, 2 Moo. & S. 543, 2 L. J. C. Pl. 34; *Whitehead v. Lord*, 7 Exch. 691, 21 L. J. Exch. 239.

*Arkansas*.—*LaCotts v. Quertermous*, 84 Ark. 376, 105 S. W. 872.

*Massachusetts*.—*Eliot v. Lawton*, 7 Allen 274, 83 Am. Dec. 683; *Powers v. Manning*, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

*Missouri*.—*Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17.

*New York*.—*Gleason v. Clark*, 9 Cow. 57; *Castro v. Bennet*, 2 Johns. 296; *Tenney v. Berger*, 93 N. Y. 530, 45 Am. Rep. 263; *Pickard v. Pickard*, 83 Hun 338, 31 N. Y. S. 989.

*Question of Sufficient Cause for*

*Jury*.—In *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17, it was held that if the client unreasonably refused to advance money for expenses and services in a reasonable amount, during the progress of extended litigation, sufficient cause might be furnished thereby to justify his attorney in withdrawing from the cause; and, in such circumstances, it was entirely proper to submit the question of reasonable cause to the jury under proper instructions. And see to the same effect *Pickard v. Pickard*, 83 Hun 338, 31 N. Y. S. 987; *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

<sup>17</sup> *Thomas v. Morrison*, 46 S. W. 46, modified 92 Tex. 329, 48 S. W. 500.

<sup>18</sup> *Clark v. Nichols*, 127 App. Div. 219, 111 N. Y. S. 66.

<sup>19</sup> *Asher v. Beckner*, 41 S. W. 35, 19 Ky. L. Rep. 521; *Sweeney v. Kerr*, (Ky.) 25 S. W. 273.

<sup>20</sup> *Tenney v. Berger*, 48 Super. Ct. 11, affirmed 93 N. Y. 524, 45 Am. Rep. 263. See also *Montgomery v. Montgomery*, 2 Hawaii 677; *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

<sup>1</sup> *Morgan v. Roberts*, 38 Ill. 65.

That senior counsel, engaged in the trial of a cause, designates a reputable attorney, who has been engaged in former trials of the same cause, to

also, any conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate the attorney would furnish sufficient cause for his withdrawal from the case.<sup>2</sup> That defendant failed on several occasions to appear when her case was called and did not furnish her counsel with a list of witnesses, and failed to appear for trial, did not warrant her counsel in abandoning her defense without having previously given her timely notice of his intention so to do.<sup>3</sup> Notice of an attorney's withdrawal from the cause should be given to the client and also to the opposite party or his counsel.<sup>4</sup>

**§ 140. By Death of Client.**—The death of the client terminates the relation of attorney and client,<sup>5</sup> and, of course, puts an

argue a motion for a new trial, does not warrant the junior counsel in abandoning the case contrary to his agreement to prosecute it to final determination. *White v. Wright*, 16 Mo. App. 551.

<sup>2</sup> *Genrow v. Flynn*, 166 Mich. 564, Ann. Cas. 1912D 638, 131 N. W. 1115, 35 L.R.A.(N.S.) 960; *Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060. See also *Dempsey v. Dorrance*, 151 Mo. App. 429, 132 S. W. 33.

Upon learning that a case is dependent on false testimony, an attorney is warranted in ignoring an agreement to carry on the litigation. *Rush v. Cavanaugh*, 2 Pa. St. 187; *Campbell v. Goodman*, 23 Pa. Co. Ct. 609.

<sup>3</sup> *Brown v. Green*, (La.) 62 So. 154.

<sup>4</sup> *Underwood v. Lewis*, [1894] 2 Q. B. (Eng.) 306, 64 L. J. Q. B. 60, 70 L. T. N. S. 833, 42 W. R. 517, 9 Rep. 440; *Nicholls v. Wilson*, 11 M. & W. (Eng.) 106, 12 L. J. Exch. 266, 2 Dowl. N. S. 1031; *Vansandau v. Browne*, 9 Bing. 462, 23 E. C. L. 315, 2 Moo. & S. 543, 2 L. J. C. Pl. 34; *Whitehead v. Lord*,

7 Exch. (Eng.) 691, 21 L. J. Exch. 239; *Boyd v. Stone*, 5 Wis. 240.

<sup>5</sup> *England*.—*Whitehead v. Lord*, 7 Exch. 691; *Palmer v. Reiffenstein*, 1 M. & G. 94, 39 E. C. L. 370.

*United States*.—*Hunt v. Rousmanier*, 8 Wheat. 174, 5 U. S. (L. ed.) 589; *Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 U. S. (L. ed.) 981; *Eagleton Mfg. Co. v. West, etc., Mfg. Co.*, 2 Fed. 774; *Farrand v. Land, etc., Imp. Co.*, 86 Fed. 393, 58 U. S. App. 559, 30 C. C. A. 128.

*California*.—*Judson v. Love*, 35 Cal. 463; *Moyle v. Landers*, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22; *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; *In re Turner*, 139 Cal. 85, 72 Pac. 718; *Deiter v. Kiser*, 158 Cal. 259, 110 Pac. 921.

*Illinois*.—*Risley v. Fellows*, 10 Ill. 531; *Turnan v. Temke*, 84 Ill. 286.

*Indiana*.—*Harness v. State*, 57 Ind. 1; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

*Kentucky*.—*Clark v. Parish*, 1 Bibb 547; *Campbell v. Kincaid*, 3 T. B. Mon. 69.

end to the attorney's authority.<sup>6</sup> The attorney may, however, be retained by the heirs, or other representatives of his client, to continue the business for which he was originally employed.<sup>7</sup> In the absence of such subsequent retainer, however, an attorney cannot continue a case after his client's death,<sup>8</sup> nor can he appear and

*Maryland.*—In re Young, 3 Md. Ch. 461.

*Massachusetts.*—Gleason v. Dodd, 4 Met. 333; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336.

*Michigan.*—Courser v. Jackson, 159 Mich. 119, 123 N. W. 604, 16 Detroit Leg. N. 845.

*Missouri.*—Prior v. Kiso, 96 Mo. 303, 9 S. W. 898; Chicago, etc., R. Co. v. Woodson, 110 Mo. App. 208, 85 S. W. 105; State v. Riley, 219 Mo. 667, 118 S. W. 647. See also Price v. Haerberle, 25 Mo. App. 201.

*Montana.*—State v. District Court, 42 Mont. 496, Ann. Cas. 1912B 246, 113 Pac. 472.

*Nebraska.*—Corson v. Lewis, 77 Neb. 446, 109 N. W. 735.

*New Jersey.*—Wood v. Hopkins, 3 N. J. L. 689.

*New York.*—Austin v. Monroe, 4 Laus. 67; Lapaugh v. Wilson, 43 Hun 619, 6 N. Y. St. Rep. 624; VanCampen v. Bruns, 54 App. Div. 86, 66 N. Y. S. 344; Stirnermaun v. Cowing, 7 Johns. Ch. 275; Balbi v. Duvet, 3 Edw. 418; Avery v. Jacob, 59 Super. Ct. 585 mem., 15 N. Y. S. 564; Clark v. Richards, 3 E. D. Smith 89; Putnam v. VanBuren, 7 How. Pr. 31; Adams v. Nellis, 59 How. Pr. 385; Beach v. Gregory, 2 Abb. Pr. 206, 3 Abb. Pr. 78; Amore v. LaMothe, 5 Abb. N. Cas. 146; In re Robbins, 61 Misc. 114, 112 N. Y. S. 1032.

*Ohio.*—Cisna v. Beach, 15 Ohio 300, 45 Am. Dec. 576; Villhauer v. Toledo, 5 Ohio Dec. 8, 32 Cinc. L. Bul. 154.

*Pennsylvania.*—Peries v. Aycinena, 3 W. & S. 64.

*Texas.*—Gray v. Cooper, 23 Tex. Civ. App. 3, 56 S. W. 105; Stark v. Hart, 22 Tex. Civ. App. 544, 54 S. W. 378.

*Vermont.*—Wells v. Foss, 81 Vt. 15, 69 Atl. 155.

*West Virginia.*—Teter v. Irwin, 69 W. Va. 200, Ann. Cas. 1913A 707, 71 S. E. 115.

<sup>6</sup> Butler v. Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 U. S. (L. ed.) 981; Maury v. Fitzwater, 88 Fed. 768; McCormick v. Shaughnessy, 19 Idaho 465, 114 Pac. 22, 34 L.R.A. (N.S.) 1188.

<sup>7</sup> Whartenby v. Reay, 92 Cal. 74, 28 Pac. 56; Succession of Liles, 24 La. Ann. 490.

*Presumption of Authority to Act for Representatives.*—Where the petitioner in a suit for partition died, and the action was revived in the name of his widow and son, as his devisee and heir, the authority of the counsel employed by the deceased to act for plaintiffs, in the suit as revived, must be presumed to continue unless the contrary is shown. Wilson v. Smith, 22 Grat. (Va.) 493.

<sup>8</sup> Bourguignon v. Boudousquie, 3 La. 526.

A contract between attorney and client for compensation for the attorney's services, to be rendered in an action against the client, is abandoned by the attorney where, after the client's death, he neglects to inform

suggest the death of his client, for the purpose of obtaining an order of revivor.<sup>9</sup> So, an attorney cannot collect money due his client,<sup>10</sup> issue execution,<sup>11</sup> or enter satisfaction,<sup>12</sup> or a release of record,<sup>13</sup> or receive money collected by the sheriff on an execution in favor of his client,<sup>14</sup> or use money collected for his client to redeem land from a tax sale, in order to protect such client's interest therein,<sup>15</sup> or apply for leave to perfect evidence of service,<sup>16</sup> or remit part of a verdict.<sup>17</sup> So, the client's death revokes the attorney's authority as to the giving<sup>18</sup> or receiving of notice.<sup>19</sup> Nor can the attorney admit a mistake in the amount of a judgment, or consent to its correction,<sup>20</sup> or file pleadings,<sup>1</sup> or take an appeal,<sup>2</sup> or

the executor of the existence of the contract, and permits him to retain other counsel to carry on the litigation. *Bolte v. Fichtner*, 68 Hun 147, 22 N. Y. S. 725.

<sup>9</sup> *Chicago, etc., R. Co. v. Woodson*, 110 Mo. App. 208, 85 S. W. 105.

A revivor of a pending suit in the name of his client's personal representatives, without being requested by them, is without authority, and no action can be maintained for compensation for services rendered after the client's death; to recover for such services, there must be specific proof of employment by the heirs or the personal representatives. *Campbell v. Kincaid*, 3 T. B. Mon. (Ky.) 68; *Newbaker v. Alricks*, 5 Watts (Pa.) 183.

<sup>10</sup> *Turnan v. Temke*, 84 Ill. 286; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89; *Gray v. Cooper*, 23 Tex. Civ. App. 3, 56 S. W. 105.

In *Louisiana* it has been held that the death of a client does not dissolve the contract of an attorney to collect a judgment. *Succession of Labauve*, 34 La. Ann. 1187.

<sup>11</sup> *Smith v. Alexander*, 80 Ala. 251.

<sup>12</sup> *Turnan v. Temke*, 84 Ill. 286; *Harness v. State*, 57 Ind. 1.

<sup>13</sup> *Harness v. State*, 57 Ind. 1.

<sup>14</sup> *Risley v. Fellows*, 10 Ill. 531.

<sup>15</sup> *Farrand v. Land, etc., Imp. Co.*, 86 Fed. 393, 58 U. S. App. 559, 30 C. C. A. 128.

<sup>16</sup> *Lapaugh v. Wilson*, 43 Hun 619, 6 N. Y. St. Rep. 624.

<sup>17</sup> *Rundles v. Jones*, 3 Ind. 35.

<sup>18</sup> *Deiter v. Kiser*, 158 Cal. 259, 110 Pac. 921.

<sup>19</sup> *Pedlar v. Stroud*, 116 Cal. 461, 48 Pac. 371; *In re Turner*, 139 Cal. 85, 72 Pac. 718; *In re Beckwith*, 90 N. Y. 667; *Holt v. Idleman*, 34 Ore. 114, 54 Pac. 279.

<sup>20</sup> *Cook v. Parham*, 63 Ala. 456.

<sup>1</sup> *Giles v. Eaton*, 54 Me. 186.

<sup>2</sup> *Stith v. Winbush*, 3 La. 442; *Coffin v. Edgington*, 2 Idaho 627, 23 Pac. 80; *McCormick v. Shaughnessy*, 10 Idaho 465, 114 Pac. 22, 34 L.R.A. (N.S.) 1188.

In *California* a statute provides that on the death of any person having a right of appeal, his attorney of record may appeal at any time before the appointment of an administrator or executor, and it has been held that such right is limited to the period prior to the appointment of a personal

institute supplementary proceedings,<sup>3</sup> in the name of his client. But an attorney may have an execution for costs and disbursements belonging to him, notwithstanding the death of his client.<sup>4</sup> And after services have been rendered by an attorney, and a lien for the payment thereof acquired, the death of his client cannot, of course, affect his right to such lien, or to compensation for his services.<sup>5</sup> So also it has been held that where the contract provides that the attorney shall prosecute a cause to judgment, it will not be dissolved by the client's death.<sup>6</sup> Thus the death of a person who employed an attorney to defend another, does not terminate the employment where the performance of the contract by the attorney was possible without any direction or intervention on the part of the employer, and it was the intention of the parties that the employment should continue until the object thereof was accomplished.<sup>7</sup> The same is true where the attorney's power is coupled with an interest.<sup>8</sup> As a matter of practice, at common law, a judgment will be entered on the verdict on motion, as of a preceding day or term of the court, whenever an action, continued or postponed for the purpose of obtaining a disposition thereof which may relieve a dissatisfied party from a verdict, would otherwise fail by the death of a party to it.<sup>9</sup> So if the death occur after verdict, delay during the time taken for the argument of law questions upon which the validity of it depends, or for advisement thereon, will not be suffered to deprive one of the benefits to which he appears to have been justly entitled under it; and counsel will be heard.<sup>10</sup>

representative. *Deiter v. Kiser*, 158 Cal. 259, 110 Pac. 921.

<sup>3</sup> *Amoré v. LaMothe*, 5 Abb. N. Cas. (N. Y.) 146.

<sup>4</sup> *Lachenmeyer v. Lachenmeyer*, 65 How. Pr. (N. Y.) 422.

<sup>5</sup> *Wylie v. Cox*, 15 How. 416, 14 U. S. (L. ed.) 753. And see *infra*, § 606.

<sup>6</sup> *Barrett v. Towne*, 196 Mass. 487, 82 N. E. 698, 13 L.R.A.(N.S.) 643; *Price v. Haerberle*, 25 Mo. App. 201.

<sup>7</sup> *Barrett v. Towne*, 196 Mass. 487, 82 N. E. 698, 13 L.R.A.(N.S.) 643.

<sup>8</sup> *Jeffries v. New York Mut. L. Ins. Co.*, 110 U. S. 305, 4 S. Ct. 8, 28 U. S. (L. ed.) 156.

<sup>9</sup> *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336.

<sup>10</sup> *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336.

**§ 141. By Death of Attorney.** — The death of an attorney who has been retained to conduct litigation terminates the relation of attorney and client,<sup>11</sup> and also terminates the authority of a substitute appointed by the original attorney;<sup>12</sup> and the representatives of such attorney cannot employ other counsel to perform the services for which the original counsel was retained.<sup>13</sup> So where a contract is made with an attorney, and it is specially contracted or understood that he alone is to do the work, or to render the services, or that his individual skill is exclusively depended upon, the death of such attorney terminates the contract, even though he was, when retained, a member of a firm of attorneys.<sup>14</sup> Where a client enters into a contract with a firm of attorneys for certain legal services, and contracts for the services of the firm, and one of the firm dies before the contract is finally completed, the client has the option of discharging the survivors, settling for services previously rendered, and employing other counsel to conclude his pending litigation; or he may insist on the performance of the contract by the survivors.<sup>15</sup>

**§ 142. By Accomplishment of Purpose.** — The relation of attorney and client is terminated by the accomplishment of the purpose for which it was created;<sup>16</sup> and no act of the attorney can bind his client thereafter.<sup>17</sup> What will, or will not, be deemed to

<sup>11</sup> *Troy v. Hall*, 157 Ala. 592, 47 So. 1035; *Love v. Peel*, 79 Ark. 366, 95 S. W. 998; *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

<sup>12</sup> *Peries v. Aycinena*, 3 W. & S. (Pa.) 64.

<sup>13</sup> *Love v. Peel*, 79 Ark. 366, 95 S. W. 998.

<sup>14</sup> *Troy v. Hall*, 157 Ala. 592, 47 So. 1035; *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

<sup>15</sup> *McGill v. McGill*, 2 Met. (Ky.) 258; *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St.

Rep. 458, 66 L.R.A. 821. See also *McCoon v. Galbraith*, 29 Pa. St. 293.

<sup>16</sup> *Wassell v. Reardon*, 11 Ark. 705, 44 Am. Dec. 245; *Adams v. Ft. Plain Bank*, 23 How. Pr. (N. Y.) 45. See also *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000; *Atlantic Nat. Bank v. Peregoy-Jenkins Co.*, 147 N. C. 293, 61 S. E. 68; *Jones v. Williamson*, 5 Coldw. (Tenn.) 371.

<sup>17</sup> *Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817; *McLain v. Watkins*, 43 Ill. 24; *Test v. Larsh*, 98 Ind. 301; *Parker v. Downing*, 13 Mass. 465; *Lamb v. Wilson*, 3 Neb. (unoffi-



be an accomplishment of the purpose for which an attorney has been employed must of necessity depend largely on the facts presented by each case.<sup>18</sup> Thus the functions of an attorney for absent heirs cease when the heirs present themselves, and are recognized and put into possession by order of the court.<sup>19</sup> So where an attorney is employed to contest a will, his employment ceases on the withdrawal of the objections with his client's consent, and the entry of a decree admitting the will to probate.<sup>20</sup> The relation is also terminated where the matter in dispute has been settled.<sup>1</sup> So if a judgment is assigned the authority of the attorney terminates with the assignment.<sup>2</sup> When counsel has been retained to conduct litigation, his authority to represent his client therein ceases with the termination of such litigation.<sup>3</sup> The question of

cial) Rep. 505, 97 N. W. 325, *reversing* 92 N. W. 167; *Bergholtz v. Ithaca St. R. Co.*, 27 Misc. 176, 29 Civ. Pro. 201, 58 N. Y. S. 388.

<sup>18</sup> Thus the obtaining of a decree of divorce does not terminate the authority of the complainant's solicitor, where he continues to look after the settlement of property matters between the parties. *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000.

<sup>19</sup> *Succession of McArthur*, 21 La. Ann. 432.

<sup>20</sup> *Tenney v. Berger*, 48 Super. Ct. (N. Y.) 11.

<sup>1</sup> *United States*.—*Swanson v. Chicago, etc.*, R. Co., 35 Fed. 638.

*Nebraska*.—*Lavender v. Atkins*, 20 Neb. 206, 29 N. W. 467.

*New York*.—*Roberts v. Doty*, 31 Hun 128; *McDowell v. Second Ave. R. Co.*, 4 Bosw. 670. See also *McKenzie v. Rhodes*, 13 Abb. Pr. 337, 21 How. Pr. 467.

*South Dakota*.—*Grantz v. Deadwood Terra Min. Co.*, 17 S. D. 61, 95 N. W. 277.

*Tennessee*.—*Johnson v. Story*, 1 Lea 114; *Yoakley v. Hawley*, 5 Lea 673;

*Dooley v. Dooley*, 9 Lea 306; *Stephens v. Nashville, etc.*, R. Co., 10 Lea 448; *Sharpe v. Allen*, 11 Lea 518.

<sup>2</sup> *Trumbull v. Nicholson*, 27 Ill. 149; *Caldwell v. Bigger*, 76 Kan. 49, 90 Pac. 1095; *Robinson v. Brennan*, 90 N. Y. 208; *Treasurers v. McDowell*, 1 Hill L. (S. C.) 185, 26 Am. Dec. 166; *Mayer v. Blease*, 4 S. C. 10; *Mordecai v. Charleston County*, 8 S. C. 100.

It seems to be an established rule of the law relating to attorney and client that, when the interest of the client in, and his power over, the subject-matter to which the agency relates are extinguished, it dissolves the relation between the parties. *Foster v. Bookwalter*, 152 N. Y. 166, 46 N. E. 299, *affirming* 78 Hun 352, 29 N. Y. S. 116.

<sup>3</sup> *United States*.—*Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043.

*Colorado*.—*Tobler v. Nevitt*, 45 Colo. 231, 16 Ann. Cas. 925, 100 Pac. 416, 132 Am. St. Rep. 142, 23 L.R.A. (N.S.) 702.

*Georgia*.—*Nichols v. Dennis*, R. M. Charl. 188.

what amounts to a termination, however, remains; and as to that the authorities differ. The general rule undoubtedly is that, in the absence of an agreement to the contrary, litigation is so far terminated by the entry of a final judgment therein as to put an end to the authority of counsel with respect thereto,<sup>4</sup> especially the

*Kansas*.—Smith *v.* Cunningham, 59 Kan. 552, 53 Pac. 760.

*Maine*.—Gray *v.* Wass, 1 Me. 257.

*New York*.—Bathgate *v.* Haskins, 59 N. Y. 533.

*Pennsylvania*.—Campbell *v.* Canon, Add. 267; Martin *v.* Rex, 6 S. & R. 296; Neff *v.* Barr, 14 S. & R. 166.

*Tennessee*.—Love *v.* Hall, 3 Yerg. 408.

*Texas*.—Franz Falk Brewing Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450.

*Vermont*.—Langdon *v.* Castleton, 30 Vt. 285.

*Wisconsin*.—Flanders *v.* Sherman, 18 Wis. 575.

*Voluntary Dismissal*.—A contract for the employment of attorneys to prosecute a suit is terminated by the voluntary dismissal of the suit by the plaintiff. Tomlinson *v.* Polsley, 31 W. Va. 108, 5 S. E. 457.

<sup>4</sup>*United States*.—Union Bank *v.* Geary, 5 Pet. 113, 8 U. S. (L. ed.) 66; Kamm *v.* Stark, 1 Sawy. 547, 14 Fed. Cas. No. 7,604; Manning *v.* Hayden, 5 Sawy. 360, 16 Fed. Cas. No. 9,043; Grames *v.* Hawley, 50 Fed. 319; The Zilpha, 40 Ct. Cl. 200.

*Alabama*.—Albertson *v.* Goldsby, 28 Ala. 711, 65 Am. Dec. 380.

*Illinois*.—McLain *v.* Watkins, 43 Ill. 24.

*Indiana*.—Hillegass *v.* Bender, 78 Ind. 225; Test *v.* Larsh, 98 Ind. 301.

*Iowa*.—Emanuel *v.* Cooper, 153 Ia. 572, 133 N. W. 1064.

*Kentucky*.—Richardson *v.* Taibot,

2 Bibb 382; Hay *v.* Cole, 11 B. Mon. 70.

*Louisiana*.—Dangerfield *v.* Thruston, 8 Mart. N. S. 232.

*Maine*.—White *v.* Johnson, 67 Me. 287.

*Michigan*.—Ransom *v.* Sutherland, 46 Mich. 489, 9 N. W. 530; Clark *v.* McGregor, 55 Mich. 412, 21 N. W. 866.

*Minnesota*.—Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55; Berthold *v.* Fox, 21 Minn. 51; In re Grundysen, 53 Minn. 346, 55 N. W. 557.

*Mississippi*.—Dennis *v.* Jones, 31 Miss. 606.

*Nebraska*.—Lamb *v.* Wilson, 3 Neb. (unofficial) Rep. 505, 97 N. W. 325, rehearing denied, 70 Neb. 729, 98 N. W. 37.

*New York*.—Walradt *v.* Maynard, 3 Barb. 587; Jackson *v.* Bartlett, 8 Johns. 361; Benedict *v.* Smith, 10 Paige 126; Adams *v.* Ft. Plain Bank, 23 How. Pr. 45; Cruikshank *v.* Goodwin, 66 Hun 626 mem., 20 N. Y. S. 757; Davis *v.* Solomon, 25 Misc. 695, 56 N. Y. S. 80; Homans *v.* Tyng, 56 App. Div. 383, 67 N. Y. S. 792; Conklin *v.* Conklin, 113 App. Div. 743, 90 N. Y. S. 310.

*North Carolina*.—Newkirk *v.* Stevens, 152 N. C. 498, 67 S. E. 1013.

*South Carolina*.—Public Accounts Com'r *v.* Rose, 1 Desaus. 461; Treasurers *v.* McDowell, 1 Hill L. 184, 26 Am. Dec. 166; Mayer *v.* Blease, 4 S.

counsel of the defeated party,<sup>5</sup> even though such judgment is void.<sup>6</sup> This rule has also been applied to judgments of dismissal<sup>7</sup> and nonsuit.<sup>8</sup> There are, however, many exceptions to this rule, and in the actual practice of the law it is at least doubtful whether it is not more honored in the breach than in the observance.<sup>9</sup> Among the acknowledged exceptions to it are the authority of the attorney for the party who prevails in the judgment to collect it,<sup>10</sup> his

C. 10; *Mordecai v. Charleston County*, 8 S. C. 100.

*Tennessee*.—*Dooley v. Dooley*, 9 Lea 306.

<sup>5</sup> *Tobler v. Nevitt*, 45 Colo. 231, 16 Ann. Cas. 925, 100 Pac. 416, 132 Am. St. Rep. 142, 23 L.R.A.(N.S.) 702; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

<sup>6</sup> *Ward v. Sands*, 10 Abb. N. Cas. (N. Y.) 60.

<sup>7</sup> *Wawrzyniakowski v. Hoffman & Billings Mfg. Co.*, 137 Wis. 629, 119 N. W. 350.

Where the judgment of dismissal was rendered at a prior term, defendant's attorney had no authority, at a subsequent term, to represent his client, so as to bind him, by appearing and objecting to an order vacating the judgment of dismissal; notice to him of the vacation proceedings not being notice to the clients. *Owen v. Smith*, (Ia.) 136 N. W. 119.

<sup>8</sup> *Hoffman v. Cage*, 31 Tex. 595.

<sup>9</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

At common law the general rule was that the authority of an attorney to represent his client in an action ceases upon its final determination and the entry of judgment. Especially was this true as to the defendant's attorney, or, more accurately speaking, the attorney for the defeated party. The attorney for the prevail-

ing party was empowered, under his employment as attorney, to enforce collection of that judgment by suing out a writ of execution. A distinction is also made by some of the authorities between the power of an attorney who is retained to try a litigated issue and one employed to collect a debt. In the former case his authority is usually regarded as ending with the trial of the case. In the latter he may, it seems, appeal from the judgment, if it is against his client, or sue out a writ of error to reverse it without a new retainer. *Tobler v. Nevitt*, 45 Colo. 231, 16 Ann. Cas. 925, 100 Pac. 416, 132 Am. St. Rep. 142, 23 L.R.A.(N.S.) 702.

<sup>10</sup> *United States*.—*Union Bank v. Geary*, 5 Pet. 113; 8 U. S. (L. ed.) 65; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

*Alabama*.—See *Boren v. McGehee*, 6 Port. 432, 31 Am. Dec. 695.

*Arkansas*.—*Miller v. Scott*, 21 Ark. 396; *Conway County v. Little Rock & F. S. R. Co.*, 39 Ark. 50; *Williams v. State*, 65 Ark. 159, 46 S. W. 186.

*Connecticut*.—*Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

*Maine*.—*Gray v. Wass*, 1 Me. 257; *White v. Johnson*, 67 Me. 287.

*Massachusetts*.—*Langdon v. Potter*, 13 Mass. 319; *Pratt v. Putnam*, 13 Mass. 363.

authority to receipt for its proceeds and to discharge it,<sup>11</sup> his authority to admit service of a citation issued upon a writ of error or appeal to review it,<sup>12</sup> his authority to oppose any steps that may be taken within a reasonable time by the defeated party to reverse it,<sup>13</sup> and the authority to stipulate with opposing counsel, after the rendition of judgment in favor of his client, that the

*Michigan.*—*Foster v. Wiley*, 27 Mich. 245, 15 Am. Rep. 185.

*New York.*—*Benedict v. Smith*, 10 Paige 126; *Guilleaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141; *Magnolia Metal Co. v. Sterlingworth Railway-Supply Co.*, 6 N. Y. Ann. Cas. 405, 26 Misc. 63, 56 N. Y. S. 478, affirmed 37 App. Div. 366, 56 N. Y. S. 16.

*Pennsylvania.*—*Silvis v. Ely*, 3 W. & S. 420; *McDonald v. Todd*, 1 Grant Cas. 17.

*South Carolina.*—*Public Accounts Com'r v. Rose*, 1 Desaus. 469.

*Compare* *Treasurers v. McDowell*, 1 Hill L. (S. C.) 184, 26 Am. Dec. 167, wherein it was held that, "the authority of an attorney, when considered with a view to the duties he is required to perform, is confined to the conduct and management of his client's case, in which his skill and learning only are put in requisition, and the right to receive his client's money with special authority is an interpolation, the policy of which may well be questioned, however convenient it may be in practice, and ought not to be extended." *Quoted with approval* in *Newkirk v. Stevens*, 152 N. C. 498, 67 S. E. 1013.

*Institution of Supplementary Proceedings.*—An attorney employed to collect a claim has authority, by virtue of his original retainer, after he obtains judgment, to institute sup-

plementary proceedings thereon, and to procure the appointment of a receiver. These are proceedings in the suit. *Ward v. Roy*, 69 N. Y. 96.

*Judgments for Alimony.*—It has been held that in actions for alimony or for divorce and alimony the authority of the plaintiff's attorney terminates with the entry of judgment. *Kalmanowitz v. Kalmanowitz*, 108 App. Div. 297, 95 N. Y. S. 627; *Conklin v. Conklin*, 113 App. Div. 743, 99 N. Y. S. 310.

<sup>11</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125; *Wyckoff v. Bergen*, 1 N. J. L. 214; *Haines v. Wilson*, 85 S. C. 338, 67 S. E. 311; *Flanders v. Sherman*, 18 Wis. 575.

An Oregon statute defining the authority of an attorney, recognizes the common-law authority of an attorney to represent his client long enough after an entry of judgment in his client's favor to enable him to supervise the collection thereof, by authorizing an attorney at any time within three years after the entry of judgment to acknowledge satisfaction thereof on receiving the sum adjudged to be due his client. *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

<sup>12</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

<sup>13</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125, reversing 127 Fed. 387.

case shall abide the final decision of another action which involves the same question, and is conducted by the same attorneys.<sup>14</sup> In some jurisdictions the rule that an attorney's authority terminates with the judgment is not recognized.<sup>15</sup> Thus it has been held that the directions of the plaintiff's attorney to the sheriff, as to the mode and time of sale under an execution, are binding on the sheriff;<sup>16</sup> and that a warranty of attorney continues to exist after judgment, so long as process is required to obtain the full benefits thereof.<sup>17</sup> And while the retainer of an attorney to prosecute a suit does not of itself constitute a retainer to take an appeal or bring a writ of error,<sup>18</sup> the relationship of counsel for an appellant which existed in the court below, is presumed to continue in the appellate court unless the contrary appears.<sup>19</sup> So, the issuance of a *scire facias* is generally regarded as being so connected with the recovery of the judgment as to dispense with the necessity of a new retainer.<sup>20</sup>

### *Substitution.*

§ 143. **Right to Substitution.** — A client undoubtedly has the right to change counsel at any time with or without cause; and where the counsel whose dismissal is desired, is attorney of record in pending litigation, the client is entitled to have another attorney substituted in his stead,<sup>1</sup> even though he has given an irre-

<sup>14</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125, reversing 127 Fed. 387.

<sup>15</sup> *Nichols v. Dennis*, R. M. Charl. (Ga.) 188; *Jordan v. Turver*, 92 Ga. 379, 17 S. E. 351; *Lynch v. Com.*, 16 S. & R. (Pa.) 368, 16 Am. Dec. 582; *Flanders v. Sherman*, 18 Wis. 575.

<sup>16</sup> *Lynch v. Com.*, 16 S. & R. (Pa.) 368, 16 Am. Dec. 582.

<sup>17</sup> *Nichols v. Dennis*, R. M. Charl. (Ga.) 188.

<sup>18</sup> *Delaney v. Husband*, 64 N. J. L. 275, 45 Atl. 265; *Magnolia Metal Co. v. Sterlingworth Railway-Supply Co.*, 37 App. Div. 366, 56 N. Y. S. 16.

<sup>19</sup> *Frost v. Lawler*, 34 Mich. 235.

And see *Parks v. Adairsville Bank*, (Ga.) 78 S. E. 856.

<sup>20</sup> *Day v. Welles*, 31 Conn. 344.

Compare *Ball v. Lively*, 2 J. J. Marsh. (Ky.) 182, wherein it was held that a *scire facias* to revive is a new suit, and that the attorney who obtained the first judgment has no authority to prosecute a *scire facias* without a new warrant of authority. See also *Gonnigal v. Smith*, 6 Johns. (N. Y.) 106.

<sup>1</sup> *United States*.—*Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958; *Dodge v. Schell*, 20 Blatchf. 517, 12 Fed. 515, 10 Abb. N. Cas. (N. Y.) 465; *In re Paschal*, 10 Wall. 483, 19

vocable power of attorney to the one first employed.\* Nor is

U. S. (L. ed.) 992; *Yates v. Milwaukee*, 10 Wall. 497, 19 U. S. (L. ed.) 984; *Wilkinson v. Tilden*, 14 Fed. 778; *Ronald v. Mutual Reserve Fund L. Assoc.*, 30 Fed. 228; *In re Herman*, 50 Fed. 517; *Du Bois v. New York*, 134 Fed. 570, 69 C. C. A. 112; *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382; *New York Phonograph Co. v. Edison Phonograph Co.* 150 Fed. 233, 148 Fed. 397; *Isaacs v. Abraham*, 6 Rep. 737, 13 Fed. Cas. No. 7,094; *Carver's Case*, 7 Ct. Cl. 499; *Jones's Motion*, 15 Ct. Cl. 204.

*Arkansas*.—*Love v. Peel*, 79 Ark. 366, 95 S. W. 998.

*California*.—*People v. Norton*, 16 Cal. 436; *Faulkner v. Hendy*, 99 Cal. 172, 33 Pac. 899; *Lee v. Superior Court*, 112 Cal. 354, 44 Pac. 666; *Woodbury v. Nevada Southern R. Co.* 120 Cal. 367, 52 Pac. 650; *Woodbury v. Nevada Southern R. Co.*, 121 Cal. 165, 53 Pac. 450; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581.

*District of Columbia*.—*Kappler v. Sumpter*, 33 App. Cas. 404.

*Idaho*.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134.

*Illinois*.—*Cohen v. Smith*, 33 Ill. App. 344.

*Iowa*.—*Crosby v. Hatch*, 135 N. W. 1079.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Root v. McIlvaine*, 56 S. W. 498, 22 Ky. L. Rep. 7.

*Michigan*.—*Brown v. Brown*, How. N. P. 94.

*New Hampshire*.—*Wells v. Hatch*, 43 N. H. 246.

*New Jersey*.—*State v. Gulick*, 17 N. J. L. 435; *Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638.

*New York*.—*Creighton v. Ingersoll*, 20 Barb. 541; *Trust v. Repoor*, 15 How. Pr. 570; *Ulster County v. Brodhead*, 44 How. Pr. 411; *Prentiss v. Livingston*, 60 How. Pr. 380; *Hunt's Petition*, Tuck. 55; *McLaren v. Charrier*, 5 Paige 530; *Hazlett v. Gill*, 5 Robt. 611; *Wolf v. Trochelman*, 5 Robt. 611; *In re Prospect Ave.*, 85 Hun 257, 1 N. Y. Ann. Cas. 347, 32 N. Y. S. 1013; *In re H.*, 93 N. Y. 381; *Halbert v. Gibbs*, 16 App. Div. 126, 4 N. Y. Ann. Cas. 232, 45 N. Y. S. 113; *Barkley v. New York Cent., etc.*, R. Co. 42 App. Div. 597, 59 N. Y. S. 742; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486; *Johnson v. Ravitch*, 113 App. Div. 810, 921, 99 N. Y. S. 1059, 100 N. Y. S. 1123; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 862; *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. S. 1106; *In re Rieser*, 137 App. Div. 177, 121 N. Y. S. 1070; *Ogden v. Devlin*, 45 Super. Ct. 631; *O'Sullivan v. Metropolitan St. R. Co.*, 39 Misc. 268, 79 N. Y. S. 481; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. S. 151.

*North Dakota*.—*Schouweiler v. Allen*, 17 N. D. 516, 117 N. W. 866.

*Ohio*.—*Dodson v. Riddle*, 1 Ohio Dec. (Reprint) 54, 1 West. L. J. 393.

*Texas*.—*Arrington v. Sneed*, 18 Tex. 135.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

\* *Carver v. U. S.* 7 Ct. Cl. 499.

such right to substitution precluded by the fact that the action has been settled and discontinued by the attorney of record without authority.<sup>3</sup> It has been deemed essential to the preservation of those confidential relations which ought to prevail between counsel and client, that the client should have the right, under all reasonable conditions, to select and change his attorney at will.<sup>4</sup> Every attorney enters into the service of his client subject to the rule that his client may so dismiss or supersede him, and if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service, for the reason that his client may not keep him, and, in that event, that he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered.<sup>5</sup> The right to substitute counsel is not, as a rule, affected by the fact that the client is acting in a representative or fiduciary capacity. It has been so held as to executors, administrators,<sup>6</sup> and guardians *ad litem*.<sup>7</sup> And where the receiver for a national bank, who was plaintiff in a number of cases brought for the collection of claims, petitioned for the exclusion of the attorney of record (one not appointed by such receiver) in such cases from further appearance therein, the court said: "Consideration for the rights of the parties whose interests are represented by this receiver requires me to hold that in all pending cases in which further proceedings or some further action of the court may be necessary, the receiver has the right to dismiss his attorney at pleasure after payment of lawful charges for services rendered, and to employ a new attorney to conduct such further proceedings without assigning any reason for his action."<sup>8</sup> But it has also been held that the right of a receiver for an insolvent corporation, acting for the benefit of its creditors, to change attorneys, does not rest entirely upon his own volition, and that, in such case, the court has the right to examine the reasons for the contemplated change and determine how it will affect the interests

<sup>3</sup> Woodford v. Rasbach, 6 Civ. Pro. (N. Y.) 315.

<sup>4</sup> O'Connor v. Hendrick, 90 App. Div. 432, 86 N. Y. S. 1.

<sup>5</sup> Johnson v. Ravitch, 113 App. Div. 810, 99 N. Y. S. 1059.

<sup>6</sup> Johnson v. U. S., 11 Ct. Cl. 724.

<sup>7</sup> Bryant v. Brooklyn Heights R. Co., 64 App. Div. 542, 72 N. Y. S. 308.

<sup>8</sup> In re Herman, 50 Fed. 517.

of the beneficiaries for whom the receiver is acting.<sup>9</sup> This distinction between receivers and ordinary clients is based upon the fact that the receiver is at all times subject to the direction of the court in the performance of his duties, and that it may even control the selection of his counsel should it become proper to do so.<sup>10</sup> Unless, however, the court is satisfied that the interests of the creditors would be prejudiced by the change, it is the plain right of the receiver to select his own attorney, and a motion for substitution should be granted.<sup>11</sup> Even a statute providing for substitution of an attorney after notice to the adverse party, does not authorize an order of court associating a new attorney with others.<sup>12</sup> The right to discharge counsel has been considered heretofore.<sup>13</sup>

**§ 144. Substitution for Cause.** — Whether a substitution is sought for cause, or without it, is material only as bearing on the terms which the court may impose in allowing the change to be made. This will be considered later.<sup>14</sup> As to what will constitute a sufficient cause for the removal of counsel of record and the substitution of another will, in most cases, depend on the facts. The death, removal, suspension, or other disablement, of the attorney will, of course, necessitate a substitution, and is usually provided for by statute or rule of court.<sup>15</sup> Statutes of this kind are intended to provide for those cases only in which the attorney or solicitor,

<sup>9</sup> *Hirshfeld v. Bopp*, 5 App. Div. 202, 39 N. Y. S. 24.

<sup>10</sup> *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486.

<sup>11</sup> *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486.

<sup>12</sup> *Prescott v. Salthouse*, 53 Cal. 221.

<sup>13</sup> See *supra*, § 138.

<sup>14</sup> See *infra*, § 147.

<sup>15</sup> *Dodge v. Schell*, 12 Fed. 515; *Dodge v. Schell*, 10 Abb. N. Cas. (N. Y.) 405.

*Death as terminating the relation of attorney and client* has been considered heretofore. See *supra*, §§ 140, 141.

The *Michigan* statute provides for a stay of proceedings in the cause, for

the appointment by the client of another attorney or solicitor, in case any attorney or solicitor shall die, be removed or suspended, or cease to act as such. *People v. Plymouth Plank Road Co.*, 32 Mich. 248.

The *New York* Code of Civil Procedure, § 65, provides that "if an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally or in such other manner as the court



by reason of death, disability, or other cause, has ceased to practice in the court, and not to a case where a practicing attorney for any reason declines to go on with a particular case while still continuing in practice.<sup>16</sup> Removal from the state or judicial district wherein the cause is pending may also constitute a good cause for substitution.<sup>17</sup> So, also, as to an attorney's elevation to the bench; or to his election or appointment to any other public office or occupation the duties of which are incompatible with the rendition of service to his client.<sup>18</sup> Substitution will also be permitted for cause where the attorney of record has been guilty of misconduct toward his client,<sup>19</sup> or toward the court.<sup>1</sup> Where a litigant had not paid his solicitor, it was improper for the court to order another solicitor to be substituted, merely on the litigant's request and without any cause being shown other than a disagreement as to the amount of the fee.<sup>2</sup>

**§ 145. Substitution after Judgment.** — In many jurisdictions there is no necessity of procuring an order of substitution after final judgment has been entered in the trial court, this being considered such a termination of the cause<sup>3</sup> as will author-

directs." *Hickox v. Weaver*, 15 Hun 375; *Agricultural Ins. Co. v. Darrow*, 70 App. Div. 413, 75 N. Y. S. 128.

<sup>16</sup> *People v. Plymouth Plank Road Co.*, 32 Mich. 248.

<sup>17</sup> *Jones v. U. S.*, 15 Ct. Cl. 204.

<sup>18</sup> Where a party's attorney is promoted to the bench during the pendency of an action, thirty days' notice, personally served on him, to appoint another attorney, is sufficient to charge him with subsequent proceedings, without a rule of court ordering such appointment. *Given v. Driggs*, 3 Cai. (N. Y.) 150, Col. & C. Cas. 485 (decided under the code).

<sup>19</sup> *School Dist. No. 116 v. School Dist. No. 141*, 79 Kan. 407, 99 Pac. 620. See also *Schultheis v. Nash*, 27 Wash. 255, 67 Pac. 707.

<sup>1</sup> *Stewart v. Stewart*, 56 How. Pr. (N. Y.) 270, wherein the court said: "If the plaintiffs in this action have claims which they deem just and honest . . . they may select their own attorneys to enforce them; but such attorneys, in their presentation, must not seek to impose upon the court, nor use its powers to accomplish their purposes by wicked or corrupt practices. If they do, the court, for its own honor and dignity, will, either on its own motion or at the instance of the party who employed the attorneys, remove them from charge of the action."

<sup>2</sup> *Lanagan v. Wayne Circuit Judge*, 170 Mich. 435, 136 N. W. 398.

<sup>3</sup> See *supra*, § 142.

ize the litigant to retain other counsel for the purpose of conducting such further proceedings as may be necessary for obtaining the benefits of the judgment.<sup>4</sup> Thus other counsel may be employed to issue execution,<sup>5</sup> or prosecute an appeal.<sup>6</sup> So, counsel other than those employed in the original suit may be retained in attachment proceedings for a contempt of court for failure to perform the award.<sup>7</sup>

**§ 146. Manner of Effecting Substitution.**—The substitution of counsel may be effected not only by consent of the attorney of record and his client<sup>8</sup> but by the application of the client

<sup>4</sup> *Egan v. Rooney*, 38 How. Pr. (N. Y.) 121.

<sup>5</sup> *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55; *Knox v. Randall*, 24 Minn. 479; *Thorp v. Fowler*, 5 Cow. (N. Y.) 446.

The employment of a new attorney to enforce the judgment, and his issuing execution, is a complete substitution, so that service of papers for a stay is properly made on him. *Ward v. Sands*, 10 Abb. N. Cas. (N. Y.) 60.

<sup>6</sup> *M'Laren v. Charrier*, 5 Paige (N. Y.) 530; *Pratt v. Allen*, 19 How. Pr. (N. Y.) 450; *Webb v. Milne*, 10 Civ. Pro. (N. Y.) 27; *Magnolia Metal Co. v. Sterlingworth Railway-Supply Co.*, 37 App. Div. 366, 56 N. Y. S. 16.

*Compare Shuler v. Maxwell*, 38 Hun 240 (*affirmed without opinion* 101 N. Y. 657), wherein it was said: "Sections 1300 and 1302 of the Code of Civil Procedure show that the notice of appeal from a judgment is to be served upon the attorney for the adverse party if he is living. Therefore it follows that the power of the attorney to receive a notice of appeal extends beyond the judgment. By analogy the power to serve a notice

of appeal should extend in like manner. And if the power to serve a notice of appeal does extend beyond the judgment by virtue of the previous retainer, then it follows that another attorney cannot serve the notice until he has been substituted."

<sup>7</sup> *State v. Gulick*, 17 N. J. L. 435.

<sup>8</sup> *United States*.—*Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043.

*California*.—*Prescott v. Salthouse*, 53 Cal. 221; *Withers v. Little*, 56 Cal. 370; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581.

*Illinois*.—*Cohen v. Smith*, 33 Ill. App. 344; *Chicago Public Stock Exch. v. McClaghry*, 50 Ill. App. 358.

*Michigan*.—*People v. Plymouth Plank Road Co.*, 32 Mich. 248.

*New York*.—*Buckley v. Buckley*, 64 Hun 632 mem., 45 N. Y. St. Rep. 827; *Matter of Prospect Ave.*, 1 N. Y. Ann. Cas. 352 note; *Quinn v. Lloyd*, 36 How. Pr. 378.

*Wisconsin*.—*McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351.

*Client Represented by Firm which Dissolved*.—Where attorneys dissolve their partnership, a firm client has a right to determine which partner shall continue the conduct of an ac-

therefor without the attorney's consent;<sup>9</sup> but whether the change be effected with or without the consent of counsel, it is absolutely essential in most states, and advisable in all, that the substitution be made with the approval of the court,<sup>10</sup> and duly entered of record.<sup>11</sup> A substitution of counsel made *ex parte* by one or all of the attorneys is a nullity if made without the client's concurrence or consent.<sup>12</sup> An order substituting one attorney for another is merely an incident in the progress of a cause, and no such order can be made by a court in which no cause is pending to which the order can relate.<sup>13</sup> As a general rule, notice of the application for substitution, or the hearing thereon, need not be served on the

tion already begun for him by the firm, provided, however, that the existing lien of the firm is preserved; and, therefore, where one of two partners, upon a consent signed by the client and by that partner, of his own motion in the firm name, procured an order merely substituting himself as sole attorney, the court regarded the order duly obtained. but amended it by adding a provision that it was without prejudice to any lien of the firm attaching, at the date of the substitution, to the cause of action set forth in the complaint. *Schneible v. Travelers' Ins. Co.*, 36 Misc. 522, 73 N. Y. S. 955.

<sup>9</sup> See the cases cited in the preceding section.

<sup>10</sup> *Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958; *Wilkinson v. Tilden*, 14 Fed. 778; *Redfield v. U. S.* 27 Ct. Cl. 473; *Chicago Public Stock Exch. v. McClaughry*, 50 Ill. App. 358; *Roy v. Harley*, 1 Duer (N. Y.) 637; *Mumford v. Murray*, Hopk. (N. Y.) 369; *Hoffman v. Van Nostrand*, 14 Abb. Pr. (N. Y.) 336; *Parker v. Williamsburgh*, 13 How. Pr. (N. Y.) 250; *Krekeler v. Thaulé*, 49 How. Pr. (N. Y.) 138; *Barkley v. New York Cent. etc., R. Co.*, 42 App.

Div. 597, 59 N. Y. S. 742, *appeal dismissed* 161 N. Y. 647, 57 N. E. 1103; *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 486; *Walton v. Sugg*, 61 N. C. 98, 93 Am. Dec. 580.

<sup>11</sup> *Prescott v. Salthouse*, 53 Cal. 211; *Withers v. Little*, 56 Cal. 370; *Ulster County v. Brodhead*, 44 How. Pr. (N. Y.) 426; *Krekeler v. Thaulé*, 49 How. Pr. (N. Y.) 138; *In re Rieser*, 137 App. Div. 177, 121 N. Y. S. 1070.

<sup>12</sup> *Cohen v. Smith*, 33 Ill. App. 344; *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454, 25 N. W. 462; *Buckley v. Buckley*, 64 Hun 632 mem., 45 N. Y. St. Rep. 827; *Felt v. Nichols*, 21 Misc. 404, 47 N. Y. S. 951; *McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351.

*Consent Binds Attorney.*— See *Quinn v. Lloyd*, 36 How. Pr. (N. Y.) 378, wherein it was held that a consent for substitution given by an attorney to his client precluded the attorney from acting subsequently in the action, notwithstanding the fact that no order has been entered on such consent.

<sup>13</sup> *In re Krakauer*, 33 Misc. 674, 68 N. Y. S. 935.

opposing party or his counsel; but in some states such notice is required either by statute or rule of court.<sup>14</sup> Notice of the substitution when effected is, of course, essential.<sup>15</sup>

§ 147. *Terms.* — In allowing an application for the substitution of counsel, the court may impose such terms as are justified by the facts as being proper and equitable between the litigant and the attorney whose removal is sought;<sup>16</sup> or the application may be allowed unconditionally if that course is warranted.<sup>17</sup> This question generally presents itself where, on an application for substitution, counsel request the court to protect them in so far as compensation has become due, or lien rights have accrued, to them. It has been stated heretofore that the client may not only discharge his attorney at any time with or without cause,<sup>18</sup> but that he may also have other counsel substituted to represent him in pending actions.<sup>19</sup> It is evident, however, that these rules, if unlimited, would not only work injury to the attorney originally retained, but would actually put into the hands of discontented clients and overanxious lawyers a weapon wherewith to defraud him; and that this is the actual result of the unrestricted operation of these rules is evidenced not only by many adjudicated cases,<sup>1</sup> but by the experience of practitioners generally in those states wherein no legislative or other action has been taken for the protection of counsel fees in this respect. Substitution cannot

<sup>14</sup> *Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670; *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

<sup>15</sup> See *infra*, § 149.

<sup>16</sup> *Kappler v. Sumpter*, 33 App. Cas. (D. C.) 404.

*New York.*—Rule X. of the general rules of practice provides: "An attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise."

<sup>17</sup> *Laird v. Laird* (N. J.) 3 Atl.

339; *Stevenson v. Stevenson*, 3 Edw. (N. Y.) 340; *Whitman v. Seibert*, 27 Misc. 814, 59 N. Y. S. 185.

<sup>18</sup> See *supra*, § 138.

<sup>19</sup> See *supra*, § 143.

<sup>1</sup> *Bad Faith Indicated by Application for Substitution.*—Where the circumstances leading to the application for substitution of attorneys indicate bad faith, or collusion, or fraud, or an attempt to cheat the attorney of record out of his just claims, the court will not make an order of substitution until such claims are paid. *Sandberg v. Victor Gold, etc.*, Min. Co., 18 Utah 66, 55 Pac. 74.

be prevented, however, merely because fees, contingent or other, are due,<sup>2</sup> or a lien has accrued,<sup>3</sup> to the attorney of record; but the practice in several jurisdictions, in the allowance of applications for substitution, protects counsel in so far as he is entitled to compensation or disbursements,<sup>4</sup> and also with respect to his

<sup>2</sup> *United States*.—*Ronald v. Mutual Reserve Fund L. Assoc.*, 30 Fed. 228; *DuBois v. New York*, 134 Fed. 570, 69 C. C. A. 112; *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382.

*California*.—*People v. Norton*, 16 Cal 436; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Root v. McIlvaine*, 56 S. W. 498; *Joseph v. Lapp*, 78 S. W. 1119; *Goodin v. Hays*, 88 S. W. 1101.

*New York*.—*Gardner v. Tyler*, 5 Abb. Pr. N. S. 33; *Stevenson v. Stevenson*, 3 Edw. 340; *Trust v. Repoor*, 15 How. Pr. 570; *Cregier v. Cheesbrough*, 25 How. Pr. 200; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. S. 1059.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

*Compare* *Gulf, etc., R. Co. v. Miller*, 21 Tex. Civ. App. 609, 53 S. W. 709, in which case it was held that one having a claim against another for personal injuries, who contracts with an attorney for its collection, and in consideration for his services transfers to him an interest in his cause of action, cannot, without the consent of his attorney, in the absence of fraud, revoke the powers conferred on him, such powers being coupled with an interest in the claim.

See also *Steenburgh v. Miller*, 11 App. Div. 286, 42 N. Y. S. 333, where-

in it appears that an attorney contracted to foreclose a mortgage of \$1,500 for one-half the amount recovered. Pending the suit the mortgagee's interest therein was levied on by a judgment creditor for \$480, the creditor buying at the execution sale. On his motion another attorney was substituted in the foreclosure suit, which was continued for the benefit of the creditor, and it was held that, as the original attorney had a greater interest in the suit than the creditor, in the absence of misconduct on his part, the order of the substitution was erroneous.

<sup>3</sup> *Alabama*.—*Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

*Michigan*.—*Jones v. Muskegon Circuit Judge*, 95 Mich. 289, 54 N. W. 876; *Wipfler v. Warren*, 103 Mich. 189, 128 N. W. 178, 17 Detroit Leg. N. 905.

*Missouri*.—*United R. Co. v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262.

*New York*.—*Prentiss v. Livingston*, 60 How. Pr. 380; *Stewart v. Fleck*, 43 Hun 636, 6 N. Y. St. Rep. 524; *De Witt v. Stender*, 52 Hun 615, 5 N. Y. S. 602; *People's Bank v. Thompson*, 24 Civ. Pro. 62, 30 N. Y. S. 858; *Kunath v. Bremer*, 53 App. Div. 271, 65 N. Y. S. 830.

<sup>4</sup> *England*.—*Twort v. Dayrell*, 13 Ves. Jr. 195.

*United States*.—*In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *Sloo v. Law*, 4 Blatchf. 268, 22 Fed.

lien.<sup>5</sup> But where an attorney undertakes a suit under an agreement that his client may substitute another attorney at will, the

Cas. No. 12,958; *Wilkinson v. Tilden*, 14 Fed. 778, 21 Blatchf. 192; *In re Herman*, 50 Fed. 517; *New York Phonograph Co. v. Edison Phonograph Co.*, 150 Fed. 233, *denying rehearing in* 148 Fed. 397; *Carver v. U. S.*, 7 Ct. Cl. 499.

*Alabama*.—*Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

*Kentucky*.—*Joseph v. Lapp*, 78 S. W. 1119.

*New Jersey*.—*Hudson Trust, etc., Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638.

*New York*.—*Creighton v. Ingersoll*, 20 Barb. 541; *Stevenson v. Stevenson*, 3 Edw. 340; *Mumford v. Murray*, Hopk. 369; *Wolf v. Trochelman*, 5 Robt. 611; *Hoffman v. Van Nostrand*, 14 Abb. Pr. 336; *Ulster County v. Brodhead*, 44 How. Pr. 411; *Ogden v. Devlin*, 45 Super. Ct. 631; *Howland v. Taylor*, 6 Hun 237; *Greenfield v. New York*, 28 Hun 320; *Matter of Prospect Ave.*, 85 Hun 257, 1 N. Y. Ann. Cas. 352 note, 32 N. Y. S. 1013; *In re Mitchell*, 57 App. Div. 22, 9 N. Y. Ann. Cas. 224, 67 N. Y. S. 961; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *British Empire Typesetting Mach. Co. v. Spellissy*, 83 App. Div. 640 mem., 82 N. Y. S. 47; *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. S. 111, *affirmed* 177 N. Y. 557, 69 N. E. 1125; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. S. 496; *In re Cable*, 114 App. Div. 375, 99 N. Y. S. 1096; *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. S. 1106; *O'Sullivan v. Metropolitan St. R. Co.*,

39 Misc. 268, 79 N. Y. S. 481; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. S. 151.

*North Carolina*.—*Walton v. Sugg*, 61 N. C. 98, 93 Am. Dec. 580.

*Utah*.—*Sandberg v. Victor Gold & Silver Min. Co.*, 18 Utah 66, 55 Pac. 74.

*Washington*.—*Payette v. Willis*, 23 Wash. 299, 63 Pac. 254; *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

*Set-Off Against Fees Due*.—On an application for substitution of attorneys, an indebtedness to the client, of the attorney sought to be removed, will be set off against the fees to which the attorney is entitled. *In re Prospect Ave.*, 85 Hun 257, 1 N. Y. Ann. Cas. 347, 32 N. Y. S. 1013.

<sup>5</sup> *United States*.—*Wilkinson v. Tilden*, 14 Fed. 778; *Ronald v. Mutual Reserve Fund L. Assoc.*, 30 Fed. 228.

*Idaho*.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57.

*New Jersey*.—*Hudson Trust & Savings Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638.

*New York*.—*Hazlett v. Gill*, 5 Robt. 611; *Ulster County v. Brodhead*, 44 How. Pr. 411; *Philadelphia v. Postal Tel. Cable Co.*, 1 App. Div. 387, 37 N. Y. S. 291; *Hinman v. Devlin*, 40 App. Div. 234, 57 N. Y. S. 1037; *Jeffards v. Brooklyn Heights R. Co.*, 49 App. Div. 45, 63 N. Y. S. 530; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *In re Leaster*, 149 App. Div. 938, 134 N. Y. S. 401; *Schneible v. Travelers' Ins. Co.* 36 Misc. 522, 32 Civ. Pro. 273, 73 N. Y. S. 955; *De Angelis v. Savings Bank*, 74 Misc. 394, 132 N. Y. S. 295.

court will not require the payment of fees, in advance of a recovery, as a condition of such substitution.<sup>6</sup> Nor will the court make an order for the protection of attorney fees, or alleged liens, for the payment of services which are without,<sup>7</sup> or of doubtful,<sup>8</sup> value. So, also, where an attorney abandons his client's cause, is unfaithful thereto, or acts inconsistent with his trust, the court may allow substitution without payment of his fee.<sup>9</sup> The determination as to whether an attorney in a will contest has been guilty of such misconduct as to justify an unconditional substitution should not be made on conflicting affidavits.<sup>10</sup>

### § 148. Determining Amount Due or Existence of Lien. —

Where, on motion to substitute attorneys, the amount due is disputed, or the existence of a lien controverted, the court may determine these issues for itself in a summary manner,<sup>11</sup> or the questions presented may be referred to a referee.<sup>12</sup> Substitution may

See also *Lodge v. Gaunt*, 16 W. N. C. (Pa.) 438, wherein it was held that an attorney who was retained to bring an action, and acted as the plaintiff's attorney up to the time of the entry of the judgment, could not thereafter, on motion, be compelled to withdraw his appearance, and give up his record title to a part of the judgment when the attorney claimed that, by an agreement with the client, his compensation was to consist of a portion of the judgment recovered.

<sup>6</sup> *Wilkinson v. Tilden*, 14 Fed. 778.

<sup>7</sup> *Reynolds v. Kaplan*, 3 App. Div. 420, 38 N. Y. S. 764; *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. S. 1106.

<sup>8</sup> *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382.

<sup>9</sup> *Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958; *Tuck v. Manning*, 53 Hun 455, 17 Civ. Pro. 175, 6 N. Y. S. 140; *Barkley v. New York Cent., etc., R. Co.*, 35 App. Div. 167, 54 N. Y. S. 970; *Barkley v. New York Cent., etc., R. Co.*, 42 App. Div.

597, 59 N. Y. S. 742, *appeal dismissed*, 161 N. Y. 647, 57 N. E. 1103; *Matter of Mitchell*, 57 App. Div. 22, 9 N. Y. Ann. Cas. 224, 67 N. Y. S. 961; *Cary v. Cary*, 97 App. Div. 471, 89 N. Y. S. 1061.

<sup>10</sup> *In re Leaster*, 149 App. Div. 938, 134 N. Y. S. 401.

<sup>11</sup> *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. S. 151.

<sup>12</sup> *Dean v. Driggs*, 82 Hun 561, 31 N. Y. S. 548; *Matter of Mitchell*, 57 App. Div. 22, 67 N. Y. S. 961; *Yungling v. Betz*, 58 App. Div. 8, 68 N. Y. S. 574; *Matter of Dept. of Public Works*, 58 App. Div. 459, 89 N. Y. S. 413; *British Empire Typesetting Mach. Co. v. Spellissy*, 83 App. Div. 640 mem., 82 N. Y. S. 47; *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. S. 111, *affirmed* without opinion 177 N. Y. 557, 69 N. E. 1125; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *Scheu v. Blum*, 124 App. Div. 678, 109 N. Y. S. 130; *Lederer v. Goldston*,

be allowed, however, and security required, pending the proceeding before the referee.<sup>13</sup> Where, on a motion by plaintiff for substitution, and to fix compensation, the withdrawing attorney submitted an affidavit stating that he had been retained by plaintiff's managing director; that later he agreed, with a person representing plaintiff, to withdraw, and receive a certain sum of money, a percentage of the damages recovered, and an equitable share of any costs awarded, it was held that a referee should be appointed to take proof as to the alleged agreement, and to ascertain the amount due thereunder, if proved, and, if not proved, then the reasonable value of the attorney's services.<sup>14</sup> Upon an appeal from an order fixing the amount, the court is at liberty to examine the record for the purpose of determining what would be a fair and reasonable compensation to the attorney;<sup>15</sup> and it is within the discretion of the court to reject the referee's conclusions.<sup>16</sup> A client who seeks to remove his attorneys without any charge of misconduct against them, waives his right to have a jury trial as to the amount to which such attorneys are entitled;<sup>17</sup> but a claim, presented by counsel whose removal is sought, for the breach of the contract of employment, cannot be summarily determined; a claim of this character being recoverable, if at all, only in an action at law in which the parties would have the right to a trial by jury.<sup>18</sup>

**§ 149. Notice of Substitution.** — Where a litigant has procured the substitution of another to take the place of his original attorney of record, it is necessary that due notice of such change

63 Misc. 322, 117 N. Y. S. 151; *Ulster County v. Brodhead*, 44 How. Pr. 411. See also *Philadelphia v. Postal Tel. Cable Co.*, 1 App. Div. 387, 37 N. Y. S. 291; *Chatfield v. Hewlett*, 2 Dem. 191.

<sup>13</sup> *Isaacs v. Abraham*, 6 Rep. 737, 13 Fed. Cas. No. 7,094; *Yuengling v. Betz*, 58 App. Div. 8, 68 N. Y. S. 574.

<sup>14</sup> *British Empire Typesetting Mach. Co. v. Spellissy*, 83 App. Div. 640 mem., 82 N. Y. S. 47.

<sup>15</sup> *Dean v. Driggs*, 82 Hun 561, 31 N. Y. S. 548, *affirmed on opinion below* in 145 N. Y. 595, 40 N. E. 163.

<sup>16</sup> *Chatfield v. Hewlett*, 2 Dem. (N. Y.) 191.

<sup>17</sup> *Yuengling v. Betz*, 58 App. Div. 8, 68 N. Y. S. 574.

<sup>18</sup> *In re Public Works*, 58 App. Div. 459, 69 N. Y. S. 413, *modified* 167 N. Y. 501, 60 N. E. 781.



be given to the opposite party or his counsel. Local rules or statutory provisions should be consulted and carefully complied with in this respect.<sup>19</sup> Even though it should not be required by any positive law or rule, it is customary and advisable that such notice be given. Under the practice prevailing in many jurisdictions, the opposing party, if not notified of the change, need not recognize the substituted attorney as the attorney of record, nor will he be bound by the acts of such attorney.<sup>20</sup> Indeed, until notice has been given to the adverse party, he may lawfully continue to recognize the authority of the original attorney of record.<sup>1</sup> Such requirements, however, are for the benefit of the adverse party,

<sup>19</sup> *England*.—*Ryland v. Noakes*, 1 Taunt. 342.

*United States*.—*Wilkinson v. Tilden*, 14 Fed. 778.

*California*.—*Grant v. White*, 6 Cal. 55; *Prescott v. Salthouse*, 53 Cal. 221; *Withers v. Little*, 56 Cal. 370.

*Illinois*.—*Chicago Public Stock Exch. v. McClaughry*, 50 Ill. App. 358.

*Maine*.—*White v. Johnson*, 67 Me. 287.

*Michigan*.—*Comfort v. Stockbridge*, 38 Mich. 342; *Kelley v. Circuit Judge*, 79 Mich. 392, 44 N. W. 925.

*Minnesota*.—*McFarland v. Butler*, 11 Minn. 72, 77.

*New York*.—*Bogardus v. Richtmeyer*, 3 Abb. Pr. 179; *Hoffman v. Rowley*, 13 Abb. Pr. 399; *Miller v. Shall*, 67 Barb. 446; *Given v. Driggs*, 3 Cai. 150; *Robinson v. McClellan*, 1 How. Pr. 90; *Heath v. Taylor*, 2 How. Pr. 121; *Dorlon v. Lewis*, 7 How. Pr. 132; *Parker v. Williamsburgh*, 13 How. Pr. 250; *Krekeler v. Thaulé*, 49 How. Pr. 138; *Hardenbergh v. Thompson*, 1 Johns. 61; *Hildreth v. Harvey*, 3 Johns. Cas. 300; *Boeram v. Jerome*, 1 Wend. 293.

*Oregon*.—*Poppleton v. Nelson*, 10 Ore. 437.

*Wisconsin*.—*Waterhouse v. Freeman*, 13 Wis. 339.

<sup>20</sup> *Comfort v. Stockbridge*, 38 Mich. 342; *Kelley v. Circuit Judge*, 79 Mich. 392, 44 N. W. 925; *McFarland v. Butler*, 11 Minn. 72; *Robinson v. McClellan*, 1 How. Pr. (N. Y.) 90; *Heath v. Taylor*, 2 How. Pr. (N. Y.) 121; *Waterhouse v. Freeman*, 13 Wis. 339.

Sufficient notice of the retainer of a new attorney to prosecute the appeal is given by the service by him on the adverse party of the notice of appeal and the undertaking to perfect the appeal. *Magnolia Metal Co. v. Sterlingworth Railway-Supply Co.*, 37 App. Div. 366, 56 N. Y. S. 16.

<sup>1</sup> *Maine*.—*White v. Johnson*, 67 Me. 287.

*Michigan*.—*Comfort v. Stockbridge*, 38 Mich. 342.

*New York*.—*Miller v. Shall*, 67 Barb. 446; *Parker v. Williamsburgh*, 13 How. Pr. 250.

*Oregon*.—*Poppleton v. Nelson*, 10 Ore. 437.

*Wisconsin*.—*Waterhouse v. Freeman*, 13 Wis. 339.

and may be waived by him or his attorney, and such waiver may be either express or implied.<sup>2</sup>

**§ 150. Effect of Substitution.**—The effect of an order of substitution duly obtained and entered of record, notice of which has been given to, or waived by, the adverse party, is to make the substituted counsel the attorney of record, and to vest him with all the authority which that position implies. Such substitution, and notice thereof, also has the effect of cancelling the authority of the original attorney of record, and he can, thereafter, do no act which will bind his former client.<sup>3</sup> The substitute, however, will be bound by the lawful agreements and stipulations of the original counsel in regard to the litigation.<sup>4</sup>

*Imputed Notice and Knowledge.*

**§ 151. General Rule.**—The general rule is that notice to, and knowledge of, the attorney, during the existence of the professional relationship and concerning the subject-matter thereof, will be imputed to the client;<sup>5</sup> so, also, a client's knowledge of facts affect-

<sup>2</sup> *Withers v. Little*, 56 Cal. 370; *Livermore v. Webb*, 56 Cal. 489; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

<sup>3</sup> See *Sheldon v. Mott*, 84 Hun 608 (mem.), 32 N. Y. S. 667; *Felt v. Nichols*, 21 Misc. 404, 47 N. Y. S. 951; *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75.

<sup>4</sup> *McDonough v. Daly*, 3 Mo. App. 606.

<sup>5</sup> *United States v. Galpin v. Page*, 18 Wall. 350, 21 U. S. (L. ed.) 959; *Brent v. Maryland*, 18 Wall. 430, 21 U. S. (L. ed.) 777; *Rogers v. Palmer*, 102 U. S. 263, 26 U. S. (L. ed.) 164; *Gay v. Parpart*, 106 U. S. 679, 1 S. Ct. 456, 27 U. S. (L. ed.) 256; *Wight v. Muxlow*, 8 Ben. 52, 29 Fed. Cas. No. 17,629; *Brown v. Jefferson County Nat. Bank*, 9 Fed. 258.

*Alabama*.—*Pepper v. George*, 51 Ala. 190; *Price v. Carney*, 75 Ala. 546.

*Arkansas*.—*Allison v. Falconer*, 75 Ark. 343, 87 S. W. 639.

*California*.—*Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Dorland v. Smith*, 93 Cal. 120, 28 Pac. 812; *People v. Duncan*, 8 Cal. App. 187, 96 Pac. 414.

*Colorado*.—*Shideler v. Fisher*, 13 Colo. App. 106, 57 Pac. 864.

*Connecticut*.—*Sweeney v. Pratt*, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101.

*District of Columbia*.—*Patten v. Warner*, 11 App. Cas. 149.

*Georgia*.—*Whitten v. Jenkins*, 34 Ga. 297; *Brown v. Oattis*, 55 Ga. 416; *Barfield v. McCombs*, 89 Ga. 799, 15 S. E. 666.

*Hawaii*.—Tisdale v. The Bark H. W. Almy, 4 Hawaii 503.

*Illinois*.—Williams v. Tatnall, 29 Ill. 553; Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51, *affirming* 50 Ill. App. 476; Manufacturers' Paper Co. v. Lindblom, 80 Ill. App. 267; Patterson v. Northern Trust Co., 132 Ill. App. 208, *affirmed* 230 Ill. 334, 82 N. E. 837; McNemar v. McNemar, 143 Ill. App. 184.

*Indian Territory*.—Dorrance v. McAlister, 1 Ind. Ter. 473, 45 S. W. 141.

*Iowa*.—Walker v. Ayres, 1 Ia. 449; Jones v. Bamford, 21 Ia. 217; Allen v. McCalla, 25 Ia. 464, 96 Am. Dec. 56; Walker v. Schreiber, 47 Ia. 529; Crouse v. Morse, 49 Ia. 389; Hayward v. Goldsbury, 63 Ia. 436, 19 N. W. 307; Foy v. Armstrong, 113 Ia. 629, 85 N. W. 753.

*Kentucky*.—Lusk v. Salter, 1 Bush 311; Pittsburg, etc., R. Co. v. Woolley, 12 Bush 451; Semonin v. Duereson, 13 Ky. L. Rep. 169.

*Maine*.—Blake v. Clary, 83 Me. 154, 21 Atl. 841.

*Maryland*.—Baltimore v. Whittington, 78 Md. 231, 27 Atl. 984; Shartzer v. Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786.

*Michigan*.—Roskopp v. Circuit Judge, 97 Mich. 628, 56 N. W. 940.

*Minnesota*.—Sheldon v. Risedorph, 23 Minn. 518; Bates v. A. E. Johnson Co., 79 Minn. 354, 82 N. W. 649.

*Mississippi*.—Allen v. Poole, 54 Miss. 323; Edwards v. Hillier, 70 Miss. 803, 13 So. 692.

*Missouri*.—Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359; Hedrick v. Beeler, 110 Mo. 91, 19 S. W. 492; Priddy v. Mackenzie, 205 Mo. 181, 103 S. W. 968. See also *State v.*

*Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062.

*Montana*.—Roush v. Fort, 3 Mont. 175.

*New Hampshire*.—Butler v. Morse, 66 N. H. 429, 23 Atl. 90.

*New York*.—McCutcheon v. Dittman, 164 N. Y. 355, 58 N. E. 97, *modifying* 23 App. Div. 285, 48 N. Y. S. 360; Stone v. Schenectady R. Co., 99 App. Div. 44, 90 N. Y. S. 742; Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 N. Y. S. 741, *affirmed* 198 N. Y. 586, 92 N. E. 1105; Hyde v. Bloomingdale, 23 Misc. 728, 51 N. Y. S. 1025; Bishop v. Bishop, 30 Abb. N. Cas. 296, 24 N. Y. S. 888; Taft v. Wright, 47 How. Pr. 1; Kendall v. Niebuhr, 58 How. Pr. 156, 45 Super. Ct. 542; Lockner v. Holland, 81 N. Y. S. 730. See also *Sommers v. Cottentin*, 26 App. Div. 241, 49 N. Y. S. 652.

*North Carolina*.—Pierce v. Perkins, 17 N. C. 250; Hulbert v. Douglas, 94 N. C. 122.

*Pennsylvania*.—Hood v. Fahnestock, 8 Watts. 489, 34 Am. Dec. 489; Chester v. Schaffer, 24 Pa. Super. Ct. 162; Mutual Bldg., etc., Assoc. Case, 19 Pa. Co. Ct. 504; *In re Patterson*, 234 Pa. St. 128, 82 Atl. 1130.

*South Carolina*.—Sullivan v. Su-song, 40 S. C. 154, 18 S. E. 268; Peoples v. Warren, 51 S. C. 560, 29 S. E. 659; Scottish American Mortg. Co. v. Clowney, 70 S. C. 229, 3 Ann. Cas. 437, 49 S. E. 569.

*Texas*.—Givens v. Taylor, 6 Tex. 315; Stroud v. Casey, 25 Tex. 740, 78 Am. Dec. 556; Van Hook v. Walton, 28 Tex. 59; Riordan v. Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37; Presidio County v. Shock, 24 Tex. Civ. App. 622, 60 S. W. 287; Bradford v. Malone, 49 Tex. Civ. App. 440,

ing litigation is equivalent to the knowledge of his attorney.<sup>6</sup> Thus because of information in the possession of his attorney, the client may be charged with knowledge of the intention of a creditor to create a preference in securing, or paying, an indebtedness to him.<sup>7</sup> So an attorney's knowledge of incumbrances<sup>8</sup> and conveyances,<sup>9</sup> though unrecorded,<sup>10</sup> will be imputed to the client. A client is chargeable with notice of the assignment of a note, if his attorney had actual notice of the fact.<sup>11</sup> But a client is not chargeable with knowledge acquired by his attorney when the relation of attorney and client did not exist between them, and it is immaterial whether the attorney became acquainted with the facts before the professional relationship began or after it had terminated;<sup>12</sup> excepting that if information acquired before the relationship began, is

130 S. W. 1013; *Bexar Building & Loan Assoc. v. Lockwood*, 54 S. W. 253; *Missouri, etc., R. Co. v. Bacon*, 80 S. W. 572; *Newton v. Easterwood*, 154 S. W. 646.

*Vermont*.—*Vermont Min., etc., Co. v. Windham County Bank*, 44 Vt. 489.

*Washington*.—*Wells v. McMahon*, 3 Wash. Ter. 532, 18 Pac. 73; *Hyman v. Barmon*, 6 Wash. 516, 33 Pac. 1076; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561; *Schmidt v. Olympia Light, etc., Co.*, 46 Wash. 360, 90 Pac. 212.

*Canada*.—*Burns v. Wilson*, 28 Can. Sup. Ct. 207; *Real Estate Invest. Co. v. Metropolitan Bldg. Soc.*, 3 Ont. 476; *Green v. Stevenson*, 9 Ont. L. Rep. 671; *McCauley v. Butler*, 1 Ont. W. Rep. 343.

<sup>6</sup> *McNemar v. McNemar*, 143 Ill. App. 184.

<sup>7</sup> *Wight v. Muxlow*, 8 Ben. 52, 29 Fed. Cas. No. 17,629; *Shideler v. Fisher*, 13 Colo. App. 106, 57 Pac. 864. *Compare Hoover v. Greenbaum*, 62 Barb. (N. Y.) 188.

<sup>8</sup> *Allison v. Falconer*, 75 Ark. 343,

87 S. W. 639; *Fordtran v. Cunningham*, (Tex.) 141 S. W. 562.

<sup>9</sup> *Kendall v. Niebuhr*, 58 How. Pr. (N. Y.) 156, 45 Super. Ct. 542.

<sup>10</sup> *Allison v. Falconer*, 75 Ark. 343, 87 S. W. 639.

<sup>11</sup> *Walker v. Schreiber*, 47 Ia. 529. See also *Daniels v. Pratt*, 2 Tenn. Ch. 116.

<sup>12</sup> *Alabama*.—*McCormick v. Joseph*, 83 Ala. 401, 3 So. 796; *Scotch Lumber Co. v. Sage*, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932.

*California*.—*Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L.R.A. 197; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

*Hawaii*.—*Cartwright v. Everett*, 7 Hawaii 216.

*Illinois*.—*Dunlap v. Wilson*, 32 Ill. 517; *Campbell v. Benjamin*, 69 Ill. 244.

*Louisiana*.—*Adams v. Henning*, 9 La. Ann. 225.

*Massachusetts*.—*Vietor v. Spalding*, 199 Mass. 52, 84 N. E. 1016, 127 Am. St. Rep. 472.

*New York*.—*Hope F. Ins. Co. v.*

so precise and definite that it must have been present in the attorney's mind and memory in transacting his client's business, knowledge thereof will be imputed to the client.<sup>13</sup> A client is not chargeable with knowledge of information which his attorney, though possessing it, is not at liberty to disclose, as, for instance, confidential communications.<sup>14</sup> Nor is a client chargeable with knowledge or notice obtained by his attorney of matters in which he is not acting professionally for his client,<sup>15</sup> or while he is acting as

*Cambreleng*, 3 *Thomp. & C.* 495; *Central Trust Co. v. West India Imp. Co.*, 169 *N. Y.* 314, 62 *N. E.* 387, reversing 48 *App. Div.* 147, 63 *N. Y. S.* 853.

*North Carolina*.—*Starr v. Hall*, 87 *N. C.* 381; *Arrington v. Arrington*, 114 *N. C.* 151, 19 *S. E.* 351.

*Pennsylvania*.—*Hood v. Fahnestock*, 8 *Watts* 489, 34 *Am. Dec.* 489.

*South Carolina*.—*Reed v. Reed*, 19 *S. C.* 548; *Steinmeyer v. Steinmeyer*, 55 *S. C.* 9, 33 *S. E.* 15.

*Tennessee*.—*Chicago Sugar-Refining Co. v. Jackson Brewing Co.*, 48 *S. W.* 275; *Kirklin v. Atlas Sav., etc., Assoc.*, 60 *S. W.* 149.

*Texas*.—*Smith v. Wilson*, 1 *Tex. Civ. App.* 115, 20 *S. W.* 1119; *Taylor v. Evans*, 16 *Tex. Civ. App.* 409, 41 *S. W.* 877; *Beck v. Avondino*, 20 *Tex. Civ. App.* 330, 50 *S. W.* 207.

*Washington*.—*Pacific Mfg. Co. v. Brown*, 8 *Wash.* 352, 36 *Pac.* 273.

*Attorney Acting for Collection Agency*.—Where an attorney is employed by a firm of collecting agents, who have received the claim to be collected from its owners, his knowledge is not that of the owners of the claim, but of the collecting agency only. *Hoover v. Wise*, 91 *U. S.* 308, 23 *U. S. (L. ed.)* 393, affirming 61 *N. Y.* 305.

<sup>13</sup> *Denton v. Ontario County Nat. Bank*, 150 *N. Y.* 126, 44 *N. E.* 781;

*Abell v. Howe*, 43 *Vt.* 403; *Deering v. Holcomb*, 26 *Wash.* 588, 67 *Pac.* 240, 561.

<sup>14</sup> *The Distilled Spirits*, 11 *Wall.* 356, 20 *U. S. (L. ed.)* 167; *Sebald v. Citizens' Deposit Bank*, 105 *S. W.* 130, 31 *Ky. L. Rep.* 1244; *Wright v. Snell*, 12 *Ohio Cir. Dec.* 308, 22 *Ohio Cir. Ct.* 86; *Melms v. Pabst Brewing Co.*, 93 *Wis.* 153, 66 *N. W.* 518, 57 *Am. St. Rep.* 899.

As to privileged communications generally, see *supra*, §§ 92-132.

<sup>15</sup> *United States*.—*Hitner v. Suckley*, 2 *Wash.* 465, 12 *Fed. Cas. No.* 6,543.

*Alabama*.—*Mundine v. Pitts*, 14 *Ala.* 84.

*District of Columbia*.—*Parish v. Hedges*, 34 *App. Cas.* 21.

*Georgia*.—*Jordan v. Tarver*, 92 *Ga.* 379, 17 *S. E.* 351.

*Kansas*.—*Atchison, etc., R. Co. v. Benton*, 42 *Kan.* 698, 22 *Pac.* 698.

*Massachusetts*.—*Vietor v. Spalding*, 199 *Mass.* 52, 84 *N. E.* 1016, 127 *Am. St. Rep.* 472, 202 *Mass.* 234, 88 *N. E.* 846.

*Michigan*.—*Larzelere v. Starkweather*, 38 *Mich.* 96; *Stewart v. Sprague*, 71 *Mich.* 50, 38 *N. W.* 673.

*Minnesota*.—*Trentor v. Pothen*, 46 *Minn.* 298, 49 *N. W.* 129, 24 *Am. St. Rep.* 225.

attorney for others.<sup>16</sup> Nor is merely constructive notice to an attorney binding on his client;<sup>17</sup> thus where one of a firm of attorneys is merely chargeable with constructive notice of a transaction had with his copartner, but has no actual knowledge thereof, a new client who employs him specially for the transaction of other business is not bound by such constructive notice.<sup>18</sup>

*Missouri.*—Weil v. Reiss, 167 Mo. 125, 66 S. W. 946.

*New Hampshire.*—Tucker v. Tilton, 55 N. H. 223.

*New York.*—Van Saun v. Farley, 4 Daly 165; Hope F. Ins. Co. v. Cambreleng, 3 Thomp. & C. 495; Henry v. Derby, 53 Super. Ct. 125; Sommers v. Cottentin, 26 App. Div. 241, 49 N. Y. S. 652; Olyphant v. Phyfe, 48 App. Div. 1, 62 N. Y. S. 688, *affirmed* 166 N. Y. 630, 60 N. E. 1117; Mathews v. Damainville, 100 App. Div. 311, 15 N. Y. Ann. Cas. 436, 91 N. Y. S. 524, *reversing* 43 Misc. 546, 89 N. Y. S. 493.

*North Carolina.*—Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351.

*Tennessee.*—Daniels v. Pratt, 74 Tenn. 443; Neilson v. Weber, 107 Tenn. 161, 64 S. W. 20; Kirklin v. Atlas Savings & Loan Assoc., 60 S. W. 149.

*Texas.*—Meuley v. Zeigler, 23 Tex. 88.

*Washington.*—Haynes v. Gay, 37 Wash. 230, 79 Pac. 794.

*Canada.*—MacArthur v. Hastings, 15 Manitoba 500.

<sup>16</sup> *Alabama.*—Pepper v. George, 51 Ala. 190; Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 So. 607, 90 Am. St. Rep. 932.

*Georgia.*—Equitable Securities Co. v. Green, 113 Ga. 1013, 39 S. E. 434.

*Illinois.*—McCormick v. Wheeler,

36 Ill. 114, 85 Am. Dec. 388; Herrington v. McCollum, 73 Ill. 476.

*Kentucky.*—Downer v. Porter, 116 Ky. 422, 76 S. W. 135, 25 Ky. L. Rep. 571; Sebald v. Citizens' Deposit Bank, 105 S. W. 130, 31 Ky. L. Rep. 1244.

*Michigan.*—Warner v. Hall, 53 Mich. 371, 19 N. W. 40.

*Missouri.*—Ford v. French, 72 Mo. 250.

*New York.*—Denton v. Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781; McCutcheon v. Dittman, 23 App. Div. 285, 48 N. Y. S. 360, *affirmed*, 164 N. Y. 355, 58 N. E. 97; Olyphant v. Phyfe, 48 App. Div. 1, 62 N. Y. S. 688, *affirmed*, 166 N. Y. 630, 60 N. E. 1117; Bates v. Rosenberg, 121 N. Y. S. 335.

*Pennsylvania.*—Chester v. Schaffer, 24 Pa. Super. Ct. 162.

*South Carolina.*—Steinmeyer v. Steinmeyer, 55 S. C. 9, 33 S. E. 15.

*Texas.*—Rogers v. Driscoll, 125 S. W. 599.

*Washington.*—Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273.

<sup>17</sup> N. W. Construction Co. v. Valle, 16 Manitoba 201.

<sup>18</sup> Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L.R.A. 197; Brown v. Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 228; Weil v. Reiss, 167 Mo. 125, 66 S. W. 946.

## CHAPTER VIII.

### DEALINGS BETWEEN ATTORNEY AND CLIENT—ACQUIRING ADVERSE INTERESTS—REPRESENTING CONFLICTING INTERESTS.

#### *Dealings Between Attorney and Client.*

- § 152. General Rule.
- 153. Existence of Professional Relationship.
- 154. Dealings not Necessarily Void.
- 155. Necessity of Advising and Informing Client.
- 156. Fraud.
- 157. Assignments and Conveyances Generally.
- 158. Assignment or Conveyance of Subject-Matter of Litigation.
  
- 159. Conveyances to Defraud Creditors.
- 160. Gifts.
- 161. Wills.
- 162. Contracts to Indemnify Client.
- 163. Laches.

#### *Acquiring Adverse Interest in Subject-Matter of Employment.*

- 164. General Rule.
- 165. To Whom Rule Applies.
- 166. Purchase at Judicial or Other Public Sale.
- 167. Outstanding Titles.
- 168. Outstanding Claims.
- 169. Purchase Held to be in Trust for Client.
- 170. Rights of Third Persons.
- 171. Effect of Client's Consent.
- 172. Existence of Professional Relationship.
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#### *Representing Conflicting Interests.*

- 174. General Rule.
- 175. Extent and Application of Rule.
- 176. Test as to Whether Interests Are Conflicting.
- 177. Effect of Former Retainer.
- 178. Agreement Permitting Adverse Employment.
- 179. Effect of Accepting Adverse Employment.

180. Restraining Attorney from Acting Adversely to Client.  
 181. Civil and Criminal Proceedings Growing out of Same Subject-Matter.  
 182. Waiver of Objection.

*Dealings Between Attorney and Client.*

§ 152. **General Rule.**—The relation of attorney and client is one of the highest trust and confidence, requiring the attorney to observe the utmost good faith towards his client.<sup>1</sup> The law regards the client as being under the influence and control of the attorney while the ordinary professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized,<sup>2</sup> especially where his clients are persons of inferior capacity and inexperienced in business;<sup>3</sup> and if the transaction presents even a suggestion of unfair dealing,<sup>4</sup> the burden of proof rests with the attorney to show that it was

<sup>1</sup> *California*.—In re Danford, 157 Cal. 425, 108 Pac. 322.

*Illinois*.—Jennings v. McConnel, 17 Ill. 148.

*Florida*.—Bolles v. O'Brien, 63 Fla. 342, 59 So. 133.

*Indiana*.—McCormick v. Malin, 5 Blackf. 509.

*Iowa*.—Donaldson v. Eaton, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

*Missouri*.—Morton v. Forsee, 155 S. W. 765.

*Nebraska*.—Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

*New York*.—Howell v. Ransom, 11 Paige 538; Haight v. Moore, 37 Super. Ct. 161; De Rose v. Fay, 4 Edw. 40; In re Dunn, 205 N. Y. 398, 98 N. E. 914.

*North Carolina*.—Buffalow v. Buffalow, 22 N. C. 241.

*Oklahoma*.—Caples v. State, 3 Okla. Crim. 72, 104 Pac. 493, 494; Mohr v. Sands, 133 Pac. 238.

*South Dakota*.—In re Ramsey, 24 S. D. 266, 123 N. W. 726; Rice v. Bennett, 137 N. W. 359.

*Texas*.—Hames v. Stroud, 51 Tex. Civ. App. 562, 112 S. W. 775.

*Wisconsin*.—Ott v. Hood, 152 Wis. 97, 139 N. W. 762.

*One who represents himself to be an attorney, and who undertakes to transact legal business, is to be held to the exercise of the utmost good faith and fair dealing.* Miller v. Whelan, 158 Ill. 544, 42 N. E. 59.

<sup>2</sup> Lewis v. Helm, 40 Colo. 17, 90 Pac. 97; Gruby v. Smith, 13 Ill. App. 43; State v. Johnson, 149 Ia. 462, 128 N. W. 837; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215; Goodenough v. Spencer, 46 How. Pr. (N. Y.) 347.

<sup>3</sup> Mills v. Mills, 26 Conn. 213; Yeamans v. James, 27 Kan. 195; Brigham v. Newton, 106 La. 280, 30 So. 849.

<sup>4</sup> U. S. Oil & Land Co. v. Bell, 153 Cal. 781, 96 Pac. 901; Palms v. Howard, 129 Ky. 668, 112 S. W. 1110.



fair, just, and equitable.<sup>5</sup> In the absence of such proof, the court

<sup>5</sup> *England*.—Todd v. Wilson, 9 Beav. 486; Stump v. Gaby, 2 De G. M. & G. 623; Gresley v. Mousley, 4 De G. & J. 78; Re Holmes, 3 Giff. 337; Hunter v. Atkins, 3 Myl. & K. 113; Lewes v. Morgan, 5 Price 42; Newman v. Payne, 2 Ves. Jr. 199; Gibson v. Jeyes, 6 Ves. Jr. 266; Wood v. Downes, 18 Ves. Jr. 120.

*United States*.—Rogers v. Marshall, 3 McCrary 76; U. S. v. Coffin, 83 Fed. 337; Gilbert v. Murphey, 103 Fed. 520; Atwater v. Hadley, Syllabi 117, 2 Fed. Cas. No. 639; Myers v. Luzerne County, 124 Fed. 436.

*Alabama*.—Lecatt v. Sallee, 3 Port. 115, 29 Am. Dec. 249; Boney v. Hollingsworth, 23 Ala. 690.

*Arkansas*.—Thweatt v. Freeman, 73 Ark. 575, 84 S. W. 720.

*California*.—Valentine v. Stewart, 15 Cal. 387; Kislring v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Felton v. Le Breton, 92 Cal. 469, 28 Pac. 490; Ross v. Conway, 92 Cal. 632, 28 Pac. 785; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; U. S. Oil, etc., Co. v. Bell, 153 Cal. 781, 96 Pac. 901.

*Colorado*.—Lewis v. Helm, 40 Colo. 17, 90 Pac. 97.

*Connecticut*.—Mills v. Mills, 26 Conn. 213.

*Illinois*.—Jennings v. McConnel, 17 Ill. 148; Morrison v. Smith, 130 Ill. 316, 23 N. E. 241; Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; Miller v. Whelan, 158 Ill. 544, 42 N. E. 59; Ross v. Payson, 100 Ill. 349, 43 N. E. 399; Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299; Day v. Wright, 233 Ill. 218, 84 N. E. 226; Gruby v. Smith, 13 Ill. App. 43; Faris v. Briscoc, 78

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Ill. App. 242; Boyle v. Read, 138 Ill. App. 153.

*Indiana*.—McCormick v. Malin, 5 Blackf. 523.

*Iowa*.—Shropshire v. Ryan, 111 Ia. 677, 82 N. W. 1035; Donaldson v. Eaton, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

*Kansas*.—Yeamans v. James, 27 Kan. 195; Matthews v. Robinson, 7 Kan. App. 118, 53 Pac. 81.

*Kentucky*.—Bibb v. Smith, 1 Dana 582; Downing v. Major, 2 Dana 228; Smith v. Thompson, 7 B. Mon. 305; Clark v. Robertson, 43 S. W. 245, 19 Ky. L. Rep. 1256.

*Maine*.—Dunn v. Record, 63 Me. 17; Burnham v. Heselton, 82 Me. 500, 20 Atl. 80, 9 L.R.A. 90.

*Maryland*.—Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564.

*Michigan*.—Gray v. Emmons, 7 Mich. 533; Hooker v. Axford, 33 Mich. 453; Taylor v. Young, 56 Mich. 289, 22 N. W. 799.

*Minnesota*.—Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215.

*Mississippi*.—Meek v. Perry, 36 Miss. 245.

*Missouri*.—Caspari v. New Jerusalem First German Church, 12 Mo. App. 314; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

*New Hampshire*.—Whipple v. Barton, 63 N. H. 613, 3 Atl. 922.

*New Jersey*.—Brown v. Bulkley, 14 N. J. Eq. 451; Dunn v. Dunn, 42 N. J. Eq. 443, 7 Atl. 842; In re Sparks, 63 N. J. Eq. 242, 51 Atl. 118.

*New York*.—Starr v. Vanderheyden, 9 Johns. 253, 6 Am. Dec. 275;

will treat it as constructively fraudulent.<sup>6</sup> The rule is one of

*Brock v. Barnes*, 40 Barb. 528; *White v. Whaley*, 3 Lans. 327; *Howell v. Baker*, 4 Johns. Ch. 118; *Arden v. Patterson*, 5 Johns. Ch. 44; *Howell v. Ransom*, 11 Paige 538; *De Rose v. Fay*, 4 Edw. 40; *Berrien v. McLane*, Hoffm. 421; *Goodenough v. Spencer*, 15 Abb. Pr. N. S. 248; *Ford v. Harrington*, 16 N. Y. 285; *Nesbit v. Lockman*, 34 N. Y. 167; *Hitchings v. Van Brunt*, 38 N. Y. 335; *Place v. Hayward*, 117 N. Y. 497, 23 N. E. 25; *Haight v. Moore*, 37 Super. Ct. 161; *Wood v. Brown*, 50 Super. Ct. 516; *Gallup v. Henderson*, 53 Hun 633 mem., 6 N. Y. S. 914; *Finlay v. Leary*, 87 Hun 8, 33 N. Y. S. 872; *Turnbull v. Banks*, 22 App. Div. 508, 48 N. Y. S. 40; *Couse v. Horton*, 23 App. Div. 198, 49 N. Y. S. 132; *Snook v. Sullivan*, 53 App. Div. 602, 66 N. Y. S. 24; *McClennan v. Grant*, 83 App. Div. 599, 82 N. Y. S. 208; *Goldberg v. Goldstein*, 87 App. Div. 516, 84 N. Y. S. 782; *Bingham v. Sheldon*, 101 App. Div. 48, 91 N. Y. S. 917; *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. S. 873; *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. S. 862; *Matter of Holland*, 110 App. Div. 799, 97 N. Y. S. 202; *Purdy v. Wallace*, 47 Misc. 163, 93 N. Y. S. 608.

*North Dakota*.—*Reigi v. Phelps*, 4 N. D. 272, 60 N. W. 402; *Harmening v. Howland*, 141 N. W. 131.

*Oregon*.—*Bingham v. Salene*, 15 Ore. 208, 14 Pac. 523, 3 Am. St. Rep. 152; *In re Holman*, 42 Ore. 358, 70 Pac. 908; *Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154; *Phipps v. Willis*, 53 Ore. 190, 18 Ann. Cas. 119, 96 Pac. 866, 99 Pac. 935.

*Pennsylvania*.—*Greenfield's Estate*,

14 Pa. St. 509; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703; *O'Donnell v. Breck*, 7 Pa. Super. Ct. 24.

*Rhode Island*.—*James v. Steere*, 16 R. I. 367, 16 Atl. 143, 2 L.R.A. 164.

*South Carolina*.—*Miles v. Ervin*, 1 McCord Eq. 524, 16 Am. Dec. 623; *Taylor v. Barker*, 30 S. C. 238, 9 S. E. 115.

*South Dakota*.—*In re Egan*, 22 S. D. 355, 117 N. W. 874.

*Tennessee*.—*Planters' Bank v. Hornberger*, 4 Coldw. 573; *McMahan v. Smith*, 6 Heisk. 170; *Phillips v. Overton*, 4 Hayw. 291; *Rose v. My-natt*, 7 Yerg. 30.

*Texas*.—*Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Hames v. Stroud*, 51 Tex. Civ. App. 562, 112 S. W. 775; *Barnes v. McCarthy*, 132 S. W. 85.

*Virginia*.—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668; *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611.

*Washington*.—*Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000; *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363.

*Wisconsin*.—*Vanasse v. Reid*, 111 Wis. 303, 87 N. W. 192.

<sup>6</sup>*Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981; *Appeal of St. Leger*, 34 Conn. 434, 91 Am. Dec. 735; *Robinson v. Sharp*, 103 Ill. App. 239, *affirmed* 201 Ill. 86, 66 N. E. 299; *Condit v. Blackwell*, 22 N. J. Eq. 481.

Heirs may recover from an attorney of the ancestor's estate all profits made by him in dealing with its assets, though there was no actual fraud on his part. *Beale v. Barnett's Adm'r.*, 64 S. W. 838, 23 Ky. L. Rep. 1118.

public policy,<sup>7</sup> and applies not only to the attorney himself, but also to a clerk, in his office, who deals with the client in a matter with which he became acquainted as such clerk.<sup>8</sup> Thus where it appears that a transaction between an attorney and his client results to the attorney's advantage,<sup>9</sup> or to the client's detriment,<sup>10</sup> it is incumbent on the attorney to show that the client was in a position to deal with him at arm's length,<sup>11</sup> that he fully advised the client of the legal effect and consequences of the transaction,<sup>12</sup> and that such transaction is fair and equitable,<sup>13</sup> without misrepresentation or concealment,<sup>14</sup> and as beneficial to the client as it would have been had the client been dealing with a stranger.<sup>15</sup> In such cases all presumptions are in favor of the client and against the propriety of the transaction;<sup>16</sup> and where there is a doubt or ambiguity, the benefit thereof is to be given to the client.<sup>17</sup> But the rule placing on an attorney the burden to prove the good faith of every contract with his client does not apply where the only question is one of the construction of the contract.<sup>18</sup>

§ 153. Existence of Professional Relationship. — The rule that an attorney who contracts with his client must show that no advantage was taken of the situation applies, of course, only

<sup>7</sup> *Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564.

<sup>8</sup> *Poillon v. Martin*, 1 Sandf. Ch. (N. Y.) 569.

<sup>9</sup> *De Rose v. Fay*, 4 Edw. (N. Y.) 40; *Wood v. Brown*, 50 Super. Ct. (N. Y.) 516; *Miles v. Ervin*, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623.

<sup>10</sup> *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490.

<sup>11</sup> *U. S. v. Coffin*, 83 Fed. 337.

<sup>12</sup> *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; *Faris v. Briscoe*, 78 Ill. App. 242; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Kissam v. Squires*, 102 App. Div.

536, 92 N. Y. S. 873; *Miles v. Ervin*, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623.

<sup>13</sup> *Faris v. Briscoe*, 78 Ill. App. 242.

<sup>14</sup> *Faris v. Briscoe*, 78 Ill. App. 242. <sup>15</sup> *In re Holland*, 110 App. Div. 799, 97 N. Y. S. 202; *Phipps v. Willis*, 53 Ore. 190, 18 Ann. Cas. 119, 96 Pac. 866, 99 Pac. 935.

<sup>16</sup> *Rogers v. Marshall*, 3 McCrary (U. S.) 76; *Haight v. Moore*, 37 Super. Ct. (N. Y.) 161.

<sup>17</sup> *McKay v. Lancaster*, 15 Ky. L. Rep. 159; *Brackett v. Ostrander*, 126 App. Div. 529, 110 N. Y. S. 779.

<sup>18</sup> *Willoughby v. Mackall*, 1 App. Cas. (D. C.) 411; *Wallace v. Town*, 8 Wash. 244, 35 Pac. 1080.

where the relation of attorney and client exists.<sup>19</sup> No presumption of fraud arises because one of the parties to a transaction is an attorney, until it be shown that the other is his client.<sup>20</sup> The fact that one of the parties to a contract is an attorney, and that he offers to and does draw writings without charge, does not impose upon such attorney the duties and obligations of the professional relationship, or raise a presumption of fraud, or justify a finding of undue influence, against him.<sup>21</sup> It must be shown that the attorney had been consulted in regard to the particular transaction, or that he was in a position to take an unfair advantage of the client.<sup>1</sup> So, also, an attorney is not obliged to sustain the burden of proof as to the fairness of transactions which take place after the professional relation has terminated.<sup>2</sup> To avoid a contract then made, and otherwise unobjectionable, the client must show that it was procured by actual fraud.<sup>3</sup> But the court will not draw a nice line as to when the relation of attorney and client ceases, and will not enforce any contract, made while the confidence engendered by the relation continues, where the parties did not deal at arm's length, and on equal terms.<sup>4</sup> The relation of attorney and client presupposes an ascendant or controlling influ-

<sup>19</sup> *Jenkins v. Einstein*, 3 Biss. 128, 13 Fed. Cas. No. 7,265; *Tancre v. Reynolds*, 35 Minn. 476, 29 N. W. 171; *Bingham v. Salene*, 15 Ore. 208, 14 Pac. 523, 3 Am. St. Rep. 152. See also *Hyer v. Little*, 20 N. J. Eq. 443.

An attorney has been held entitled to retain profits made by the purchase of shares of stock from an administrator, though he had been employed by the administrator in specific matters affecting the estate, if he did not at the time of the purchase represent the estate for any purpose. *Beale v. Barnett*, 64 S. W. 838, 23 Ky. L. Rep. 1118.

<sup>20</sup> *Tatom v. White*, 95 N. C. 453.

If a party who has an undivided interest in a tract of land employs an attorney to act for him in relation to his interest, and at the same time,

as the agent of another, employs the attorney to act for such other in relation to his interest therein, the relation of attorney and client does not exist between the employer and attorney as to the interest of the party for whom the employer acted as agent. *Porter v. Peckham*, 44 Cal. 204.

<sup>21</sup> *Stout v. Smith*, 98 N. Y. 25, 50 Am. Rep. 632.

<sup>1</sup> *Jenkins v. Einstein*, 3 Biss. 128, 13 Fed. Cas. No. 7, 265.

<sup>2</sup> *Newkirk v. Stevens*, 152 N. C. 498, 67 S. E. 1013; *Jinks v. Moppin*, (Tex.) 80 S. W. 390.

<sup>3</sup> *Tancre v. Reynolds*, 35 Minn. 476, 29 N. W. 171.

<sup>4</sup> *Cline v. Charles*, (Ky.) 124 S. W. 347.

ence by the attorney on the mind of the client, and the influence thus acquired may extend more or less after the termination of such relation; and when such is the case, the transaction will be scrutinized with the same jealousy as if the relation had continued.<sup>5</sup> What amounts to such a termination of the relation has been heretofore considered.<sup>6</sup>

**§ 154. Dealings Not Necessarily Void.**—Transactions between an attorney and client are not necessarily invalid,<sup>7</sup> and where it appears that no advantage was taken of the client, that his consent to the transaction was not procured by a concealment of the facts, or by any other improper means, that he was fully advised and knew the effect and consequences of his act, the transaction will be upheld.<sup>8</sup> Thus a note by a client to his attorney will be enforced where there is strong evidence to show both the

<sup>5</sup> *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Mason v. Ring*, 3 Abb. Dec. (N. Y.) 210, 2 Abb. Pr. N. S. 322. See also *Zeigler v. Hughes*, 55 Ill. 288; *Bingham v. Sheldon*, 101 App. Div. 48, 91 N. Y. S. 917.

<sup>6</sup> See *supra*, §§ 137-142.

<sup>7</sup> *Myers v. Luzerne County*, 124 Fed. 436; *State v. Fidelity & Deposit Co.*, 94 Mo. App. 184, 67 S. W. 958; *Vanasse v. Reid*, 111 Wis. 303, 87 N. W. 192. See also *infra*, § 157.

After the attorney's death, an allegation of wrongdoing on his part will be received with disfavor. *Whiting v. Davidge*, 23 App. Cas. (D. C.) 150.

<sup>8</sup> *England*.—*Gibson v. Jeyes*, 6 Ves. Jr. 276; *Harris v. Tremheere*, 15 Ves. Jr. 34.

*United States*.—*Myers v. Luzerne County*, 124 Fed. 436.

*California*.—*Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644.

*Illinois*.—*Rolfe v. Rich*, 149 Ill.

436, 35 N. E. 352, *affirming* 46 Ill. App. 406.

*Iowa*.—*Baker v. Davenport First Nat. Bank*, 77 Ia. 615, 42 N. W. 452; *Mitchell v. Colby*, 95 Ia. 202, 63 N. W. 769.

*Kansas*.—*Holmes v. Culver*, 89 Kan. 698, 133 Pac. 164.

*Maryland*.—*Roman v. Mali*, 42 Md. 513.

*New York*.—*Nesbit v. Lockman*, 34 N. Y. 167; *Helms v. Goodwill*, 64 N. Y. 642, *reversing* 2 Hun 410; *Audley v. Jester*, 148 App. Div. 94, 132 N. Y. S. 1061.

*Rhode Island*.—*Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

*South Carolina*.—*Wise v. Hardin*, 5 S. C. 325; *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517.

*Texas*.—*Hames v. Stroud*, 51 Tex. Civ. App. 562, 112 S. W. 775.

*Wisconsin*.—*Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733.

execution of the note and a sufficient consideration therefor,<sup>9</sup> and a confession of judgment by a client to his attorney will be sustained if made with entire fairness and full knowledge of all the circumstances.<sup>10</sup> So, an attorney at law may deal with his client, and his client with him, so that the relation of debtor and creditor will not be grounded solely upon the facts of each service.<sup>11</sup> But even as to such transactions, a court of equity will relieve the client from hard bargains entered into with his attorney;<sup>12</sup> and whenever the attorney has made any profit out of his relations with his client, other than his reasonable and proper fees, he must account to his client therefor.<sup>13</sup>

### § 155. Necessity of Advising and Informing Client.—

An attorney cannot allow his personal interests to become antagonistic to those of his client;<sup>14</sup> and in dealing with his client, during the existence of the professional relation, it is the attorney's duty to advise the client fully and impartially with respect to the business which they are about to transact,<sup>15</sup> and also to impart to the client any information which he may possess in

<sup>9</sup> *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745.

<sup>10</sup> *Wise v. Hardin*, 5 S. C. 325.

<sup>11</sup> *Gregory v. Seaman*, 51 Super. Ct. (N. Y.) 517.

<sup>12</sup> *California*.—*Felton v. Le Breton*, 92 Cal. 469, 28 Pac. 490; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

*Illinois*.—*Jennings v. McConnel*, 17 Ill. 148; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

*Kentucky*.—*Downing v. Major*, 2 Dana 228; *Smith v. Thompson*, 7 B. Mon. 305.

*Massachusetts*.—*Hill v. Hall*, 191 Mass. 253, 77 N. E. 831.

*New York*.—*Finlay v. Leary*, 87 Hun 8, 33 N. Y. S. 872; *Starr v. Vanderheyden*, 9 Johns. 253, 6 Am. Dec. 275; *Barry v. Whitney*, 1 Code Rep. N. S. 101.

*Tennessee*.—*Rose v. Mynatt*, 7 Yerg. 30.

<sup>13</sup> *Tyrrell v. London Bank*, 10 H. L. Cas. (Eng.) 26, 8 Jur. N. S. 849; *Hobday v. Peters*, 28 Beav. (Eng.) 349, 29 L. J. Ch. 780, 8 W. R. 512; *Usher v. Sands*, 32 Ind. 302; *Beale v. Barnett*, 64 S. W. 838, 23 Ky. L. Rep. 1118; *De Rose v. Fay*, 4 Edw. (N. Y.) 40.

<sup>14</sup> *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

<sup>15</sup> *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721, 14 Cent. Law J. 158, 3 McCrary 76, 13 Rep. 39; *Dawson v. Copeland*, 173 Ala. 267, 55 So. 600; *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560; *Crocheron v. Savage*, 75 N. J. Eq. 580, 73 Atl. 33, 23 L.R.A. (N.S.) 679.

relation thereto.<sup>16</sup> The constructive notice derived from the recording of a mortgage does not amount to such full disclosure as is required in view of the fiduciary relation.<sup>17</sup> An attorney cannot profit by withholding the benefit of his special knowledge or by giving false counsel during the continuance of the relation.<sup>18</sup> An attorney to whom a claim is sent for collection, and who reduces it to judgment, is not estopped from asserting against such clients a prior mortgage from the debtor, though he does not inform them of such mortgage; they not having been prejudiced by his withholding the information.<sup>19</sup> Where a lawyer, ignorantly and mistakenly, yet honestly, gives advice, and thereafter enters upon a speculation in respect to the subject-matter thereof, the law treats him as the agent of his client, and holds his speculation as only for the client's benefit.<sup>20</sup>

§ 156. Fraud. — Where an attorney deceives his client by false representations or advice, or knowingly permits him to be

<sup>16</sup> *Rogers v. Marshall*, 3 McCrary (U. S.) 76; *Bolles v. O'Brien*, 63 Fla. 354, 59 So. 133; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130; *Fox v. Fox*, 250 Ill. 384, 95 N. E. 498; *Palma v. Howard*, 129 Ky. 668, 112 S. W. 1110; *Phipps v. Willis*, 53 Ore. 190, 18 Ann. Cas. 121, 96 Pac. 866, 99 Pac. 935; *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410.

<sup>17</sup> *Taylor v. Barker*, 30 S. C. 238, 9 S. E. 115.

<sup>18</sup> *England*.—*Todd v. Wilson*, 9 Beav. 486; *Foy v. Cooper*, 2 Q. B. 937, 42 E. C. L. 985, 6 Jur. 128.

*United States*.—*Rogers v. Marshall*, 3 McCrary 76; *Baker v. Humphrey*, 101 U. S. 494, 25 U. S. (L. ed.) 1065; *Doster v. Scully*, 27 Fed. 782; *Stanwood v. Wishard*, 128 Fed. 499.

*Arkansas*.—*Jett v. Hempstead*, 25 Ark. 402.

*California*.—*Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560.

*Florida*.—*Bolles v. O'Brien*, 63 Fla. 342, 354, 59 So. 133.

*Illinois*.—*Staley v. Dodge*, 50 Ill. 43; *Trotter v. Smith*, 59 Ill. 240; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59.

*Indiana*.—*McCormick v. Malin*, 5 Blackf. 509.

*Michigan*.—*Gray v. Emmons*, 7 Mich. 533.

*Mississippi*.—*Hoopes v. Burnett*, 26 Miss. 428.

*New York*.—*Howell v. Baker*, 4 Johns. Ch. 118; *Aiken v. Van Wert*, 38 Misc. 379, 77 N. Y. S. 881.

*Virginia*.—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668.

*Washington*.—*Gaffney v. Jones*, 18 Wash. 311, 51 Pac. 461.

<sup>19</sup> *State v. Fidelity, etc., Co.*, 94 Mo. App. 184, 67 S. W. 958.

<sup>20</sup> *Bulkley v. Wilford*, 2 Cl. & F. (Eng.) 174; *Doster v. Scully*, 27 Fed. 782.

deceived by the false representations of others,<sup>1</sup> he will not be permitted to retain any benefit derived from transactions so entered into by his client,<sup>2</sup> but they will be annulled;<sup>3</sup> and any money paid to the attorney, or profit made by him, as the result of negotiations so conducted with his client, may be recovered.<sup>4</sup> Such transactions will not be permitted to stand even as security for moneys advanced by the attorney for the client.<sup>5</sup> The client has the right to treat all acts of his solicitor touching his interest as done for his benefit.<sup>6</sup> Public policy and the protection of private rights, demand that the attorney shall not mislead, deceive, defraud, or betray the confiding client. The relation is confidential, and its betrayal by fraudulent acts, resulting in damages to the client, con-

<sup>1</sup> *Smith v. Thompson*, 7 B. Mon. (Ky.) 305.

<sup>2</sup> *England*.—*Bulkley v. Wilford*, 2 Cl. & F. 177.

*United States*.—*Rogers v. Marshall*, 3 McCrary 76.

*Illinois*.—*Herrick v. Lynch*, 150 Ill. 283, 37 N. E. 221; *Harding v. Helmer*, 193 Ill. 109, 61 N. E. 838, *affirming* 86 Ill. App. 190.

*Kentucky*.—*Smith v. Thompson*, 7 B. Mon. 305.

*Minnesota*.—*Struckmeyer v. Lamb*, 64 Minn. 57, 65 N. W. 930.

*Mississippi*.—*Hoopes v. Burnett*, 26 Miss. 428.

*New Jersey*.—*Cleine v. Englebrecht*, 41 N. J. Eq. 498, 5 Atl. 718.

*New York*.—*Lewis v. J. A.*, 4 Edw. 599; *Gallup v. Henderson*, 53 Hun 633 mem., 6 N. Y. S. 914, *affirmed* 127 N. Y. 667, 28 N. E. 254; *Anonymous*, 16 Abb. Pr. 423; *In re Demarest*, 11 App. Div. 156, 42 N. Y. S. 444; *Reilly v. Provost*, 98 App. Div. 208, 90 N. Y. S. 591; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Looff v. Lawton*, 97 N. Y. 478; *Dicker v. Cohen*, 84 N. Y. S. 189, 277.

*Pennsylvania*.—*Yardley v. Cuth-*

*bertson*, 108 Pa. St. 395, 1 Atl. 765, 56 Am. Rep. 218.

*Texas*.—*Hames v. Stroud*, 51 Tex. Civ. App. 562, 112 S. W. 775.

*Vermont*.—*Marshall v. Joy*, 17 Vt. 546.

*Washington*.—*Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

*Wisconsin*.—*Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

*Unlicensed Attorney*.—In *Free love v. Cole*, 41 Barb. (N. Y.) 318, it was held that the rule stated in the text applies to an unlicensed attorney.

<sup>3</sup> *McLead v. Applegate*, 127 Ind. 349, 26 N. E. 830; *Richardson v. Hagan*, 9 Ky. L. Rep. 196 (abstract); *Gray v. Emmons*, 7 Mich. 533.

<sup>4</sup> *Staley v. Dodge*, 50 Ill. 43; *Hooker v. Axford*, 33 Mich. 453; *Lewis v. J. A.*, 4 Edw. (N. Y.) 599.

<sup>5</sup> *Marden v. Dorothy*, 12 App. Div. 176, 42 N. Y. S. 834.

An attorney who has fraudulently attempted to overreach his clients is not entitled to reimbursement for taxes paid under the scheme to defraud. *Henyan v. Trevino*, (Tex.) 137 S. W. 458.

<sup>6</sup> *Wheeler v. Willard*, 44 Vt. 640.



stitutes a cause of action against the attorney.<sup>7</sup> The courts will examine critically all transactions between attorney and client for the purpose of protecting the client's rights and preventing fraud by the attorney; and any disadvantage to the client from the transaction will entitle him to relief,<sup>8</sup> without proof of actual fraud.<sup>9</sup> The burden of showing that the transaction was fair and honest, and that the client was fully apprised of his rights, and the effect and consequences of his acts, rests with the attorney,<sup>10</sup> as stated under the general rule.<sup>11</sup>

**§ 157. Assignments and Conveyances Generally.**—Assignments or conveyances of property by a client to his attorney, while the professional relationship exists, are regarded with disfavor, and presumed to have been improperly secured by the attorney<sup>12</sup> and the rule of caveat emptor does not apply to such

<sup>7</sup> *Struckmeyer v. Lamb*, 64 Minn. 57, 65 N. W. 930.

<sup>8</sup> *Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110.

*Injunction to Restrain Attorney from Availing Himself of Unconscionable Bargain.*—Where a solicitor, acting for both parties to a conveyance, prepares a conveyance to himself containing an absolute covenant for title on the part of the vendor, when he knows, or must be taken to have known, that his title was defective, he will be restrained by perpetual injunction from proceeding with an action on such covenant. *Williamson v. Moriarty*, 19 W. R. (Eng.) 818.

<sup>9</sup> *Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110; *Richardson v. Hagan*, 9 Ky. L. Rep. 196; *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Lewis v. J. A.*, 4 Edw. (N. Y.) 599.

<sup>10</sup> *California.*—*Valentine v. Stewart*, 15 Cal. 387; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308.

*Illinois.*—*Ross v. Payson*, 160 Ill. 349, 43 N. E. 399.

*Kansas.*—*Yeamans v. James*, 27 Kan. 195.

*Kentucky.*—*Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110.

*Maine.*—*Dunn v. Record*, 63 Me. 17.

*Minnesota.*—*Tancere v. Reynolds*, 35 Minn. 476, 29 N. W. 171.

*New Jersey.*—*Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067.

*New York.*—*Howell v. Ransom*, 11 Paige 540; *Lewis v. J. A.*, 4 Edw. 599.

*Oregon.*—*Phipps v. Willis*, 53 Ore. 195, 18 Ann. Cas. 119, 96 Pac. 866, 99 Pac. 935.

*Tennessee.*—*Planters' Bank v. Hornberger*, 4 Coldw. 569.

*Virginia.*—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 140, 668; *Story's Com.*, §§ 308, 312.

*Washington.*—See *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *Wallace v. Town*, 8 Wash. 244, 35 Pac. 1080.

<sup>11</sup> See *supra*, § 152.

<sup>12</sup> *United States.*—*Rogers v. Mar-*

a transfer.<sup>13</sup> It is an attorney's duty, where he enters into negotiations to purchase property from his client, to use due diligence to ascertain the value thereof, and to advise his client with respect thereto.<sup>14</sup> It is a well-settled rule, applicable to all transactions between attorney and client by way of purchase, sale, or gift, that the attorney who bargains with his client in a matter of advantage to himself must show, if the transaction afterwards is called in question, that it was in all respects fairly and equitably conducted; that he fully and faithfully discharged all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject-matter involved, and by seeing that his client either has independent advice in the matter or else receives from the attorney such advice as the latter would have been expected to give had the transaction been one between his client and a stranger. The client must be so placed

shall, 3 McCrary 76; *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721; *Brooks v. Pratt*, 118 Fed. 725, 55 C. C. A. 515.

*California*.—*Valentine v. Stewart*, 15 Cal. 387; *Kisling v. Shaw*, 33 Cal. 440, 91 Am. Dec. 644; *Coffey v. Quint*, 92 Cal. 475, 28 Pac. 494, 799; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

*Illinois*.—*Trotter v. Smith*, 59 Ill. 240; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000.

*Iowa*.—*Polson v. Young*, 37 Ia. 190.

*Kansas*.—*Yeamans v. James*, 27 Kan. 195.

*Maine*.—*Dunn v. Record*, 63 Me. 17.

*Maryland*.—*Merryman v. Euler*, 59 Md. 588, 43 Am. Rep. 564.

*Michigan*.—*Payne v. Avery*, 21 Mich. 524.

*Mississippi*.—*Cameron v. Lewis*, 56 Miss. 76.

*New Jersey*.—*Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067.

*New York*.—*Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige 540; *Matter of Demarest*, 11 App. Div. 156, 42 N. Y. S. 444; *De Rose v. Fay*, 3 Edw. 369, 4 Edw. 40; *Ford v. Harrington*, 16 N. Y. 285.

*Tennessee*.—*Planters' Bank v. Hornberger*, 4 Coldw. 569.

*Texas*.—*Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483.

*Vermont*.—*Marshall v. Joy*, 17 Vt. 546.

*West Virginia*.—*Lane v. Black*, 21 W. Va. 617; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

<sup>13</sup> *Manheim v. Woods*, 213 Mass. 537, 100 N. E. 747.

<sup>14</sup> *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721, 14 Cent. Law J. 168, 3 McCrary 79, 13 Rep. 39.

as to be enabled to deal with his attorney at arm's length, without being swayed by the relation of trust and confidence which exists between them. This principle is established both in England and in this country. It is one example of the general doctrine which the law applies to dealings between parties who stand in a fiduciary relation to each other.<sup>15</sup> The rule is based upon the consideration

<sup>15</sup> *England*.—*Edwards v. Meyrick*, 2 Hare 60, 6 Jur. 924; *Gibson v. Jeyes*, 6 Ves. Jr. 266, 5 Rev. Rep. 295; *Holman v. Loynes*, 18 Jur. 839; *Pisani v. Atty.-Gen.* L. R. 5 P. C. 517; *Cane v. Allen*, 2 Dow 289.

*United States*.—*Rogers v. Marshall*, 3 McCrary 76, 9 Fed. 721. See also *Jones v. Byrne*, 149 Fed. 457, reversed on other grounds 159 Fed. 321, 90 C. C. A. 101.

*Alabama*.—See *Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 870.

*California*.—*Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981.

*Florida*.—*Bolles v. O'Brien*, 63 Fla. 342, 354, 59 So. 133.

*Georgia*.—*Stubinger v. Frey*, 116 Ga. 396, 42 S. E. 713.

*Illinois*.—*Jennings v. McConnel*, 17 Ill. 148; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000.

*Indiana*.—See *McCormick v. Malin*, 5 Blackf. 509.

*Iowa*.—*Polson v. Young*, 37 Ia. 196; *Shropshire v. Ryan*, 111 Ia. 677, 82 N. W. 1035.

*Kansas*.—*Yeaman v. James*, 27 Kan. 195.

*Kentucky*.—See *Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110.

*Massachusetts*.—*Hill v. Hall*, 191

Mass. 253, 77 N. E. 831; *Manheim v. Woods*, 213 Mass. 537, 100 N. E. 747.

*Minnesota*.—*Tancre v. Reynolds*, 35 Minn. 476, 29 N. W. 171.

*Nebraska*.—*Hamilton v. Allen*, 86 Neb. 401, 125 N. W. 610, 28 L.R.A. (N.S.) 723.

*New Hampshire*.—See *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922.

*New Jersey*.—*Condit v. Blackwell*, 22 N. J. Eq. 481; *Porter v. Bergen*, 54 N. J. Eq. 405, 34 Atl. 1067; *Crocheron v. Savage*, 74 N. J. Eq. 629, 70 Atl. 353.

*New York*.—*De Rose v. Fay*, 4 Edw. 40; *Ellis v. Messervie*, 11 Paige 467; *Brock v. Barnes*, 40 Barb. 521; *Poilion v. Martin*, 1 Sandf. Ch. 569; *Ford v. Harrington*, 16 N. Y. 285; *Marden v. Dorothy*, 12 App. Div. 176, 42 N. Y. S. 834; *Sheehan v. Erbe*, 77 App. Div. 176, 79 N. Y. S. 43. See also *Berrien v. McLane*, Hoffm. 421; *Bingham v. Sheldon*, 101 App. Div. 48, 91 N. Y. S. 917; *Matter of Holland*, 110 App. Div. 799, 97 N. Y. S. 202; *Brackett v. Seavey*, 131 N. Y. S. 664.

*North Carolina*.—See *Lee v. Pearce*, 68 N. C. 76.

*Oregon*.—*Bingham v. Salenc*, 15 Ore. 208, 14 Pac. 523, 3 Am. St. Rep. 152; *Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*South Carolina*.—See *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517.

*Tennessee*.—See *Planters' Bank v. Hornberger*, 4 Coldw. 531.

that the relation existing between the parties is such that the attorney has it in his power to avail himself of the necessities, liberality, or credulity of, and of his influence over, the client, and of that sense of dependence, on the part of the latter, upon his attorney, which always exists to a greater or less extent, and of the confidence which the client reposes in his attorney; and also upon the fact that it is difficult, and in most cases impossible, for the client to show that advantage has been taken of the relation.<sup>16</sup> In order to sustain this burden it is incumbent on the attorney to show that the transaction was fair, honest,<sup>17</sup> and equitable,<sup>18</sup> that he used the utmost good faith in dealing with the client,<sup>19</sup> that he exerted no undue influence<sup>20</sup> and was guilty of no fraud,<sup>1</sup> that no advantage was taken of the client,<sup>2</sup> that an adequate consideration was given,<sup>3</sup> that the client understood the terms and conditions of

*Texas*.—*Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Tippett v. Brooks*, 28 Tex. Civ. App. 107, 67 S. W. 512, *affirmed* 95 Tex. 335, 67 S. W. 495, 512.

*Virginia*.—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668.

*Wisconsin*.—*Vanasse v. Reid*, 111 Wis. 303, 87 N. W. 192; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

<sup>16</sup> *Ford v. Harrington*, 16 N. Y. 285.

<sup>17</sup> *Day v. Wright*, 233 Ill. 218, 84 N. E. 226; *Goldberg v. Goldstein*, 87 App. Div. 516, 84 N. Y. S. 782; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483.

<sup>18</sup> *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720; *Faris v. Briscoe*, 78 Ill. App. 242; *Hill v. Hall*, 191 Mass. 262, 77 N. E. 831.

<sup>19</sup> *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721, 14 Cent. L. J. 168, 3 McCrary 76, 13 Rep. 39; *Dunn v. Record*, 63 Me. 17; *Payne v. Avery*, 21 Mich. 524; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

<sup>20</sup> *Carter v. West*, 93 Ky. 211, 19

S. W. 592; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842.

<sup>1</sup> *Carter v. West*, 93 Ky. 211, 19 S. W. 592, 14 Ky. L. Rep. 191. See also *supra*, § 156.

<sup>2</sup> *Kidd v. Williams*, 132 Ala. 140, 143, 31 So. 458, 56 L.R.A. 879; *Zeigler v. Hughes*, 55 Ill. 288; *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Goldberg v. Goldstein*, 87 App. Div. 516, 84 N. Y. S. 782; *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. S. 862; *Barrett v. Bamber*, 9 Phila. (Pa.) 202, 31 Leg. Int. 164; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

<sup>3</sup> *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Fox v. Fox*, 250 Ill. 384, 95 N. E. 498; *Arden v. Patterson*, 5 Johns. Ch. (N. Y.) 44; *Berrien v. McLane*, 1 Hoffm. (N. Y.) 421; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Phipps v. Willis*, 53 Ore. 190, 18 Ann. Cas. 119, 96 Pac. 866, 99 Pac. 935; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483.

the transaction<sup>4</sup> and was informed as to everything necessary to enable him to form a correct judgment with respect to the real value of the subject-matter thereof.<sup>5</sup> Should the attorney fail to establish the *bona fides* of the transaction, in the manner indicated, it will be set aside.<sup>6</sup> The vendee of an attorney, with notice, acquires no better title than his vendor had.<sup>7</sup> So, a mortgage to a third person, of property purchased by an attorney from his client, will be set aside where the presumption that the attorney did not acquire the property in good faith is not overcome, and the mortgagee has full knowledge of the client's equities in the property.<sup>8</sup> But notwithstanding the stringency of the foregoing rule, it is evident that there is no absolute inhibition of the assignment or conveyance of property by a client to his attorney,<sup>9</sup> nor are such transactions necessarily voidable.<sup>10</sup> Therefore if the transaction was in good faith, fair, honest, and equitable, and is so established by the attorney, as required by the rule above stated, it will be upheld.<sup>11</sup>

<sup>4</sup> *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 Atl. 842; *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. S. 862.

<sup>5</sup> *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Howell v. Ransom*, 11 Paige (N. Y.) 538.

<sup>6</sup> *Atwater v. Hadley*, Syllabi 117, 2 Fed. Cas. No. 639; *Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721, 13 Rep. 39; *Brooks v. Pratt*, 118 Fed. 725, 55 C. C. A. 515; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Cline v. Charles*, (Ky.) 124 S. W. 347; *Handlin v. Davis*, 4 Ky. L. Rep. 675; *Barrrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865.

<sup>7</sup> *Alwood v. Mansfield*, 59 Ill. 496; *Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387; *Poillon v. Martin*, 1 Sandf. Ch. (N. Y.) 569; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703.

<sup>8</sup> *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

<sup>9</sup> *Yeamans v. James*, 27 Kan. 195;

*Davis v. Stith*, (Ky.) 11 S. W. 810; *Roman v. Mali*, 42 Md. 513; *Vanassee v. Reid*, 111 Wis. 303, 87 N. W. 192.

<sup>10</sup> *Jenkins v. Einstein*, 3 Bias. 128, 13 Fed. Cas. No. 7,265; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Laclede Bank v. Keeler*, 109 Ill. 385; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344.

<sup>11</sup> *California*.—*Learned v. Haley*, 34 Cal. 608; *Cousins v. Partridge*, 79 Cal. 225, 21 Pac. 745.

*Florida*.—*Wharton v. Hammond*, 20 Fla. 934.

*Illinois*.—*Laclede Bank v. Keeler*, 109 Ill. 385; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Donahoe v. Chicago Cricket Club*, 177 Ill. 351, 52 N. E. 351; *Day v. Wright*, 233 Ill. 218, 84 N. E. 226.

*Iowa*.—*Baker v. Davenport First Nat. Bank*, 77 Ia. 615, 42 N. W. 452; *Mitchell v. Colby*, 95 Ia. 202, 63 N. W. 769.

*Kansas*.—*Yeamans v. James*, 27 Kan. 195.

That an attorney who took an assignment from his client for money advanced would not make an additional advance unless the assignment was executed was not an indication of fraud.<sup>12</sup>

**§ 158. Assignment or Conveyance of Subject-Matter of Litigation.** — In another place in this work a discussion will be found dealing with champerty, maintenance and barratry generally, and with statutory provisions which, in some jurisdictions, have for their object the inhibition of attorneys from purchasing claims for the purpose of bringing suit thereon, or the subject-matter of their client's litigation.<sup>13</sup> Matters of this character, however, are also condemned, within the rules now under consideration, even more emphatically than those heretofore discussed in this subdivision.<sup>14</sup> They are deemed to be presumptively void.<sup>15</sup> It is the policy of the law to especially scrutinize gifts, conveyances, and securities, given by a client to his attorney, pending the relation, when connected with the subject-matter of litigation; and it will not permit the relation, and the confidence it implies, to be turned to the profit of the attorney at the expense of the client.<sup>16</sup> But, excepting where prohibited by statute,<sup>17</sup> an assignment or conveyance, even of the subject-matter of the litigation, is not necessarily void.<sup>18</sup> To sustain such a transaction, however, when attacked by

*Kentucky.*—Clark v. Robertson, 43 S. W. 245, 19 Ky. L. Rep. 1256.

*Maryland.*—Roman v. Mali, 42 Md. 513.

*New York.*—Porter v. Parmly, 39 Super. Ct. 219; Newberg v. Schwab, 49 Super. Ct. 232.

*Oregon.*—Ah Foe v. Bennett, 35 Ore. 231, 58 Pac. 508.

*South Carolina.*—Wilson v. Cantrell, 40 S. C. 114, 18 S. E. 517.

*Texas.*—Tippett v. Brooks, 95 Tex. 335, 28 Tex. Civ. App. 107, 67 S. W. 495, 512.

<sup>12</sup> Brackett v. Seavey, 131 N. Y. S. 664.

<sup>13</sup> See *infra*, § 379 et seq.

<sup>14</sup> Rogers v. R. E. Lee Min. Co., 9 Fed. 721, 14 Cent. L. J. 168, 3 Mc-

Crary 76, 13 Rep. 39; Rogers v. Marshall, 13 Fed. 59; Crocheron v. Savage, 75 N. J. Eq. 589, 73 Atl. 33, 23 L.R.A.(N.S.) 679, reversing 74 N. J. Eq. 629, 70 Atl. 353.

<sup>15</sup> Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Ellis v. Messervie, 11 Paige (N. Y.) 467; Howell v. Ransom, 11 Paige (N. Y.) 538; Rose v. Mynatt, 7 Yerg. (Tenn.) 30; Lane v. Black, 21 W. Va. 617; Keenan v. Scott, 64 W. Va. 137, 61 S. E. 806.

<sup>16</sup> Gray v. Emmons, 7 Mich. 533.

<sup>17</sup> West v. Raymond, 21 Ind. 305.

See *infra*, §§ 164-173.

<sup>18</sup> Monaghan v. Downs, 3 Kulp (Pa.) 133; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444.

the client, the attorney must show, as stated heretofore,<sup>19</sup> that it was fair, honest, and equitable; that the client was duly informed and advised with respect to the transaction; that no advantage was taken of him, or fraud perpetrated upon him, and that an adequate consideration was paid.<sup>20</sup>

**§ 159. Conveyances to Defraud Creditors.**—An attorney who receives a conveyance of property from his client for the purpose of aiding in defrauding the client's creditors, stands, as other such grantees do, merely in the shoes of his grantor as against the creditors defrauded.<sup>1</sup> If the transaction is attacked by the client, the attorney cannot set up, as a defense, the fact that the client participated in the perpetration of the fraud and, therefore, cannot complain of the result.<sup>2</sup> Even where the conveyance by the client to his attorney is for the declared purpose of hindering and delaying the creditors of the client, it cannot be sustained as against him by the attorney, or his assignee with notice; the parties are not regarded as being *in pari delicto*, and equity will refuse to sustain such a conveyance.<sup>3</sup> The law regards the client as being drawn into the violation of its provisions through the controlling influence of his attorney over him, and for that reason intervenes for his protection.<sup>4</sup> Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and

<sup>19</sup> See *supra*, §§ 152, 157 for proof required.

<sup>20</sup> *United States*.—*Rogers v. R. E. Lee Min. Co.*, 9 Fed. 721, 14 Cent. L. J. 168, 3 McCrary 76, 13 Rep. 39.

*Georgia*.—*Stubinger v. Frey*, 116 Ga. 396, 42 S. E. 713.

*Kansas*.—*Yeamans v. James*, 27 Kan. 195.

*Illinois*.—*Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 415, 21 L.R.A. 366; *Boyle v. Read*, 138 Ill. App. 153.

*New Jersey*.—*Crocheron v. Savage*, 74 N. J. Eq. 629, 70 Atl. 353.

*New York*.—*White v. Whaley*, 40

How. Pr. 353, 3 Lans. 327. In re Post, 3 Edw. 365.

*South Carolina*.—*Miles v. Ervin*, 1 McCord Eq. 524, 16 Am. Dec. 623.

<sup>1</sup> *Smith v. Brittenham*, 109 Ill. 540; *Summers v. Taylor*, 80 Ky. 429.

<sup>2</sup> *Lindsley v. Caldwell*, 234 Mo. 498, 137 S. W. 983, 37 L.R.A. (N.S.) 161; *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25.

<sup>3</sup> *Lindsley v. Caldwell*, 234 Mo. 498, 137 S. W. 983, 37 L.R.A. (N.S.) 161.

<sup>4</sup> *Goodenough v. Spencer*, 15 Abb. Pr. N. S. (N. Y.) 248, 2 Thomp. & C. 508, 46 How. Pr. 347.

to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.<sup>5</sup> If an attorney will so far forget or wilfully disregard his duty to the courts, to his clients, and to the public, as, for the purpose of gain and profit to himself, to induce by his advice the commission of fraud by those who confide in him, he at least should be compelled to restore to his victim the fruits of his iniquity. It would be a reproach to our judicial tribunals should they allow their officers thus to acquire property by a prostitution of the trust confided to them, and then to interpose the fraud as a shield to protect them in the possession and enjoyment of that property.<sup>6</sup> Such transfers will be annulled whenever that can be done without injury to an innocent purchaser.<sup>7</sup> But that relief will not be carried so far as to disturb the rights of an innocent third party who in good faith may have been induced to part with his money or his property, relying upon the title which the attorney had the apparent right and power of transferring; the rule in that case being that where one of two innocent persons must suffer by the fraud or misconduct of a third, the loss shall be borne by him who conferred upon the wrongdoer the means of deceiving persons honestly dealing with him.<sup>8</sup>

§ 160. *Gifts.* — The general rule is that gifts made by a client to his attorney are not necessarily void, but that they are presumptively so, the burden of proof being on the attorney to establish their validity.<sup>9</sup> To establish a gift from a client to his attorney, in whatever form the question may arise, it is incumbent upon the latter to show affirmatively not only that it was voluntary, but also that it was made with full knowledge on the part of the client of all material facts known to the attorney, and that it was

<sup>5</sup> *Herrick v. Lynch*, 150 Ill. 283, 37 N. E. 221, *affirming* 49 Ill. App. 657.

<sup>6</sup> *Ford v. Harrington*, 16 N. Y. 285.

<sup>7</sup> *Goodenough v. Spencer*, 15 Abb. Pr. N. S. (N. Y.) 248, 2 Thomp. & C. 508, 46 How. Pr. 347.

<sup>8</sup> *Goodenough v. Spencer*, 15 Abb. Pr. N. S. (N. Y.) 248, 2 Thomp. & C. 508, 46 How. Pr. 347.

<sup>9</sup> *Hatch v. Hatch*, 9 Ves. Jr. (Eng.) 292; *Harris v. Tremenheere*, 15 Ves. Jr. (Eng.) 34; *Montesquieu v. Sandys*, 18 Ves. Jr. (Eng.) 313; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922; *In re Sparks*, 63 N. J. Eq. 242, 51 Atl. 118; *Nesbit v. Lockman*, 34 N. Y. 167; *Planters' Bank v. Hornberger*, 4 Coldw. (Tenn.) 567.



not brought about by any undue influence,<sup>10</sup> either actively exerted or arising from the relation between them;<sup>11</sup> the general character of the proof required being the same as that which is necessary to sustain other conveyances between attorney and counsel, and heretofore considered.<sup>12</sup> The reason for this rule is that the person receiving the benefit has actively participated in the transaction, as a party thereto, and the explanation required is very naturally within his knowledge and power.<sup>13</sup> Even without improper conduct on the part of the attorney, the law looks with great disfavor upon transactions of this character; and, as a rule, their validity will only be recognized to the extent of allowing the attorney to retain them as security for the payment to him of reasonable compensation for any professional services he may have rendered the donor.<sup>14</sup>

§ 161. Wills. — The rule that prevails as to transactions *inter vivos* between client and attorney does not apply to a will made by the client in favor of his attorney.<sup>15</sup> Undue influence is not generally presumed from the mere relation itself,<sup>16</sup> or from the fact

<sup>10</sup> *Walmesley v. Booth*, 2 Atk. (Eng.) 29; *Oldham v. Hand*, 2 Ves. (Eng.) 259; *Davis v. Walker*, 5 Ont. L. Rep. 173; *Jennings v. McConnel*, 17 Ill. 148; *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922; *In re Greenfield*, 14 Pa. St. 489.

<sup>11</sup> *Whipple v. Barton*, 63 N. H. 613, 3 Atl. 922.

<sup>12</sup> See *supra*, §§ 152, 157.

<sup>13</sup> *In re Holman*, 42 Ore. 358, 70 Pac. 908.

<sup>14</sup> *Morgan v. Minett*, 6 Ch. D. (Eng.) 638; *O'Brien v. Lewis*, 9 Jur. N. S. (Eng.) 528, 11 W. R. 318, 8 L. T. N. S. 179; *Liles v. Terry*, [1895] 2 Q. B. (Eng.) 679; *Trusts, etc., Co. v. Hart*, 32 Can. Sup. Ct. 553; *Davis v. Walker*, 5 Ont. L. Rep. 173; *Berrien v. McLane*, Hoffm. (N. Y.) 421; *Planters' Bank v. Hornberger*, 4 Coldw. (Tenn.) 567.

*In Middleton v. Welles*, 4 Bro. P. C. Attys. at L. Vol. I.—19.

(Eng.) 245, it was held that "it is an established rule in courts of equity that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, and more especially if such gift or gratuity arises immediately out of the subject then under the attorney's management, will be sustained."

<sup>15</sup> *In re Sparks*, 63 N. J. Eq. 246, 51 Atl. 118; *In re Suydam*, 84 Hun 514, 32 N. Y. S. 449.

<sup>16</sup> *In re Sparks*, 63 N. J. Eq. 246, 51 Atl. 118; *Wilson v. Moran*, 3 Bradf. (N. Y.) 172; *In re Smith*, 95 N. Y. 523; *Matter of Suydam*, 84 Hun 514, 32 N. Y. S. 449; *Haughian v. Conlan*, 86 App. Div. 290, 83 N. Y. S. 830; *In re Holman*, 42 Ore. 345, 70 Pac. 908; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98.

that the attorney prepared the will;<sup>17</sup> but these facts call for circumspection, and, coupled with other circumstances, may create a presumption of undue influence.<sup>18</sup> Thus the entire absence of independent advice, or of instructions as to how the will should be prepared, or of knowledge of its contents, except so far as the instrument itself, or some part of it, was read over in the presence of the testator before its execution, are facts which are most important in considering the effect to be given to the proof of the actual execution of the instrument, and, together with other circumstances, may bring the case within that class where there is imposed upon the proponent the burden of proving by evidence, other than that of the formal execution of the will, that it was the free, untrammelled, and intelligent expression of the wishes and intention of the decedent.<sup>19</sup> The rule that undue influence in respect to a legacy is to be presumed when the relation of attorney and client subsists between the testator and the legatee, and the will is drawn by the latter, has been recognized in some cases<sup>20</sup> which also hold that such presumption is one of fact and may be rebutted.<sup>1</sup> Fraud may, of course, be perpetrated in connection with the preparation of wills as well as other transactions, and will receive a like condemnation.<sup>2</sup> Thus where an attorney secures a devise on the pretense that he will make use of it for another, while intending nevertheless to appropriate it to his own use, he

<sup>17</sup> *White v. Cole*, (Ky.) 47 S. W. 759; *In re Wells*, 96 Me. 165, 51 Atl. 868; *Clarke v. Schell*, 84 Hun 28, 31 N. Y. S. 1053; *Matter of Suydam*, 84 Hun 514, 32 N. Y. S. 449, *affirmed* 152 N. Y. 639, 46 N. E. 1152; *Haughian v. Conlan*, 86 App. Div. 290, 83 N. Y. S. 830; *Matter of Murphy*, 28 Misc. 650, 59 N. Y. S. 1078.

But see in *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735, where the court says: "Drawing the will presents an opportunity and a temptation which, together with the personal friendship and confidence and influ-

ence of the relation, justify suspicion and the requirement from the legatee of satisfactory evidence that the opportunity was not embraced and the influence was not exerted."

<sup>18</sup> *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *In re Holman*, 42 Ore. 345, 70 Pac. 908.

<sup>19</sup> *In re Rintelen*, 77 App. Div. 142, 78 N. Y. S. 1092.

<sup>20</sup> *St. Leger's Appeal from Probate*, 34 Conn. 434, 91 Am. Dec. 735.

<sup>1</sup> *St. Leger's Appeal from Probate*, 34 Conn. 434, 91 Am. Dec. 735.

<sup>2</sup> See *supra*, § 156.

is guilty of a gross fraud and breach of confidence, and will not be allowed to retain the fruits thereof.<sup>3</sup>

**§ 162. Contracts to Indemnify Client.** — Contracts whereby an attorney agrees to indemnify his client from loss in pending litigation, which the attorney has been retained to conduct, are void,<sup>4</sup> not only because they are without consideration,<sup>5</sup> but because they are also in contravention of public policy.<sup>6</sup> The contract is equally vicious whether in the hands of the client or the attorney, and in neither can it be enforced. The client is not an innocent party; he has no right in law or morals to attempt, by contracts of this kind, to pervert the course of justice by laying before his attorneys temptations and incentives for unprofessional and unlawful conduct, and, therefore, is not entitled to the favor of the court.<sup>7</sup> Even conceding such a contract to be valid, it extends only to such liabilities as the law would recognize or enforce.<sup>8</sup> Thus a bond executed by an attorney undertaking that he would faithfully perform his duties, adds nothing to his legal liability.<sup>9</sup> But it has been said that the promise of an attorney, who has received a debt for collection, to pay the amount of the debt upon his ultimate failure to collect it, may be supported by a sufficient consideration, and, if so, is valid.<sup>10</sup>

<sup>3</sup> Hooker v. Axford, 33 Mich. 453.

<sup>4</sup> Mitchell v. Bell, 1 N. C. 244, 2 Am. Dec. 627.

<sup>5</sup> Such a promise is altogether without prejudice to the client or benefit to the attorney—the former would have been precisely in the same situation if the promise had never been made—the latter received no new confidence or regard for making it. It is within the idea of *nudum pactum* most completely. Mitchell v. Bell, 1 N. C. 157.

<sup>6</sup> Adye v. Hanna, 47 Ia. 264, 29 Am. Rep. 484.

<sup>7</sup> Adye v. Hanna, 47 Ia. 264, 29 Am. Rep. 484.

<sup>8</sup> Lindsey v. Jones, 23 Ala. 835.

<sup>9</sup> Humboldt Bldg. Assoc. v. Ducker, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073.

<sup>10</sup> Morrill v. Graham, 27 Tex. 646, wherein it was said that such a contract would be valid if the client should agree not to withdraw the business from the hands of the attorney or consent on the faith of such promise to waive a proceeding which otherwise he would have taken, and by reason of which his debt would have been secured.

§ 163. *Laches*. — In order to recover from an attorney property, or the proceeds thereof, which has been conveyed to him by his client during the continuance of the professional relationship, or to have such conveyance annulled or set aside, proceedings for that purpose should be instituted within a reasonable time.<sup>11</sup> What is a reasonable time cannot well be defined, but must be left, in large measure, to the determination of the court in view of the facts presented. Equity does not always follow the period of limitation fixed by statute and enforced in courts of law.<sup>12</sup> Parties may be required to assert their rights within a shorter time in states where the values of real estate increase rapidly, and greater temptations are thereby afforded for speculative litigation.<sup>13</sup> Such transactions cannot be avoided where they have been deliberately ratified or confirmed on full information.<sup>14</sup> Confirmation may be evidenced by long acquiescence, as by standing and allowing the purchaser to lay out money in the firm belief that his title would not be contested.<sup>15</sup> But the party who is entitled to have the transaction set aside cannot be charged with delay, or with acquiescence, or confirmation, unless he had full knowledge of all the facts, and perfect freedom of action.<sup>16</sup> Acts which might appear to be acts of acquiescence will not be held to be such, if the client is ignorant of the circumstances, or under the control of the original influence, or otherwise so situated as not to be free to enforce his rights.<sup>17</sup>

<sup>11</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Wills v. Wood*, 28 Kan. 400; *Smith v. Thompson*, 7 B. Mon. (Ky.) 310; *Porter v. Howes*, 202 Mass. 54, 88 N. E. 445; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

While it is doubtless true that an attorney, to uphold a purchase from his client, must prove the transaction fair, yet that rule does not exclude the weight which is to be given to presumptions arising from long acquiescence and death of parties and witnesses. *Wills v. Wood*, 28 Kan. 400.

<sup>12</sup> *Elmore v. Johnson*, 143 Ill. 513,

32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

<sup>13</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Smith v. Thompson*, 7 B. Mon. (Ky.) 310.

<sup>14</sup> *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

<sup>15</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

<sup>16</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130.

<sup>17</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

The defense of laches is not usually regarded with favor.<sup>18</sup> If the property has passed into the hands of a subsequent purchaser for value, and without notice, the sale can no longer be set aside. In that case the client's remedy is against the attorney.<sup>19</sup>

*Acquiring Adverse Interest in Subject-Matter of Employment.*

§ 164. **General Rule.** — It is well settled that while the relation of attorney and client continues, the attorney cannot, as against his client, acquire any beneficial interest in, or title to, the subject-matter of the litigation antagonistic to that of his client,<sup>20</sup> and if he have such an interest he must disclose it;<sup>1</sup> nor can an attorney make use of any knowledge acquired by him through his professional relations with his client, so as to promote his own advantage,

<sup>18</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

<sup>19</sup> *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

<sup>20</sup> *England*.—*Hall v. Hallet*, 1 Cox Ch. 134; *Ex p. Hughes*, 6 Ves. Jr. 617; *Holman v. Loynes*, 4 De G. M. & G. 270; *Carter v. Palmer*, 8 Cl. & F. 657.

*United States*.—*Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482; *Byers v. Surget*, 19 How. 303, 15 U. S. (L. ed.) 670; *Garinger v. Palmer*, 126 Fed. 906, 61 C. C. A. 436.

*California*.—*Sutcliff v. Clunie*, 37 Pac. 224.

*Colorado*.—*Owers v. Olathe Silver Min. Co.* 6 Colo. App. 1, 39 Pac. 980.

*Georgia*.—*Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Crayton v. Spullock*, 87 Ga. 326, 13 S. E. 561.

*Illinois*.—*McDowell v. Milroy*, 69 Ill. 498; *Sutherland v. Reeve*, 41 Ill. App. 295, 151 Ill. 384, 38 N. E. 130.

*Louisiana*.—*Hoss's Succession*, 42 La. Ann. 1022, 8 So. 833.

*Maine*.—*Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387; *Hill v. Coburn*, 105 Me. 437, 75 Atl. 67.

*Michigan*.—*Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5.

*Mississippi*.—*Cameron v. Lewis*, 56 Miss. 76.

*Missouri*.—*Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

*New York*.—*Giddings v. Eastman*, 5 Paige 561; *Hatch v. Fogerty*, 40 How. Pr. 492, 10 Abb. Pr. N. S. 147; *Case v. Carroll*, 35 N. Y. 385.

*North Carolina*.—*Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415.

*North Dakota*.—*Yerkes v. Crum*, 2 N. D. 72, 49 N. W. 422.

*Pennsylvania*.—*Galbraith v. Elder*, 8 Watts 81; *Cleavinger v. Reimar*, 3 W. & S. 486; *Hockenbury v. Carlisle*, 5 W. & S. 348; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703; *Smith v. Brotherline*, 62 Pa. St. 461.

*Vermont*.—*Davis v. Smith*, 43 Vt. 269.

<sup>1</sup> *Lazarus v. Friedrichs*, 125 La. 619, 51 So. 663.

but in every such case he will be conclusively presumed to be acting for his client's benefit.<sup>2</sup> Transactions of this character are entirely inconsistent with the professional duties of an attorney at law,<sup>3</sup> and the transaction may, at the election of his client, be set aside,<sup>4</sup> or impressed with a trust in favor of his client,<sup>5</sup> even though the client was not injured,<sup>6</sup> unless he establishes the fairness of the transaction within the rule heretofore stated in another connection.<sup>7</sup> Indeed, it has been said that to insure the utmost fidelity, an attorney should forever after be barred, without his client's consent, from making private gain out of a sale which he was once

<sup>2</sup> *England*.—Taylor v. Blacklow, 3 Bing. N. Cas. 235, 32 E. C. L. 100.

*California*.—Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68; Sutliff v. Clunie, 37 Pac. 224.

*Colorado*.—Owers v. Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980.

*Georgia*.—Larey v. Baker, 86 Ga. 468, 12 S. E. 684.

*Illinois*.—Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130; Patterson v. Northern Trust Co., 132 Ill. App. 208, affirmed 230 Ill. 334, 82 N. E. 837, 231 Ill. 22, 82 N. E. 840, 121 Am. St. Rep. 299; Boyle v. Read, 138 Ill. App. 153.

*Kansas*.—Cunningham v. Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

*Louisiana*.—Lacey v. Waples, 28 La. Ann. 158.

*Michigan*.—Gott v. Brigham, 41 Mich. 227, 2 N. W. 5.

*Minnesota*.—Sandford v. Flint, 108 Minn. 399, 122 N. W. 315.

*Missouri*.—Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78.

*New York*.—Reigal v. Wood, 1 Johns. Ch. 402; Hatch v. Fogerty, 40 How. Pr. 492, 10 Abb. Pr. N. S. 147.

*South Carolina*.—Taylor v. Barker, 30 S. C. 238, 9 S. E. 115.

*Vermont*.—Wheeler v. Willard, 44 Vt. 640.

<sup>3</sup> *Arkansas*.—Wright v. Walker, 30 Ark. 44.

*Colorado*.—Owers v. Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980.

*Kansas*.—Cunningham v. Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

*Kentucky*.—Handlin v. Davis, 81 Ky. 34.

*Minnesota*.—Sandford v. Flint, 108 Minn. 399, 122 N. W. 315.

*New York*.—Howell v. Baker, 4 Johns. Ch. 118; Bush v. Halsted, 121 App. Div. 538, 106 N. Y. S. 133.

*Pennsylvania*.—Elliott v. Tyler, 6 Atl. 917.

<sup>4</sup> Baker v. Humphrey, 101 U. S. 494, 25 U. S. (L. ed.) 1065; Levara v. McNeny, 5 Neb. (unofficial) Rep. 318, 98 N. W. 679, modified 73 Neb. 414, 102 N. W. 1042.

<sup>5</sup> Nichols v. Riley, 118 App. Div. 404, 103 N. Y. S. 554. And see *infra*, § 169.

<sup>6</sup> Hare v. De Young, 39 Misc. 366, 79 N. Y. S. 868.

<sup>7</sup> See *supra*, § 152.

employed to prevent.<sup>8</sup> An attorney who realizes a fund upon a judgment in his own favor out of his client's debtor, is not, however, bound to apply the fund to the satisfaction of his client's debt.<sup>9</sup>

**§ 165. To Whom Rule Applies.**—The rule stated above applies to every one who acts for another in the capacity of attorney, and acquires by his relationship the influence ordinarily exerted by an attorney over his client.<sup>10</sup> Thus a party who acts as confidential adviser, in a suit before a magistrate, fills the place of an attorney so far as to bring him within the rule.<sup>11</sup> So, also, the rule applies to a managing clerk in a solicitor's office, who, in that capacity, has acquired the confidence of the client, and who deals with the client in a matter with which he became acquainted as such clerk.<sup>12</sup> But one retained as attorney for an assignee in trust for the benefit of creditors, occupies no such fiduciary relation towards the assigned estate as renders him incompetent to become the purchaser of the promissory note of the assignor, and to claim payment thereof out of the funds in the hands of the assignee.<sup>13</sup>

**§ 166. Purchase at Judicial, or Other Public Sale.**—Public policy demands that there should be no temptation on the part of one occupying the relation of attorney to make private gain out of the subject-matter of his professional employment. Therefore, it is a well-settled general rule that an attorney is, by reason of the confidential relation existing between himself and his clients, incapacitated to buy and hold property sold at a judicial, or other public sale, in which his client, as such, is interested, where such purchase would result in injury or disadvantage to his client.<sup>14</sup>

<sup>8</sup> *Nichols v. Riley*, 118 App. Div. 404, 103 N. Y. S. 554.

<sup>9</sup> *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

<sup>10</sup> *Sheehan v. Erbe*, 103 App. Div. 7, 92 N. Y. S. 862; *Smith v. Brotherline*, 62 Pa. St. 461. See also *Jinks v. Moppin*, (Tex.) 80 S. W. 390.

Question whether one occupied relation of attorney or of broker held for

jury. *O'Donnell v. Breck*, 7 Pa. Super. Ct. 24. And see also *supra*, § 152; and *infra*, § 172.

<sup>11</sup> *Buffalow v. Buffalow*, 22 N. C. 241.

<sup>12</sup> *Poillon v. Martin*, 1 Sandf. Ch. (N. Y.) 569.

<sup>13</sup> *Sallade's Appeal*, 36 Pa. St. 420.

<sup>14</sup> *England*.—*Hall v. Hallett*, 1 Cox Ch. 134; *Sidny v. Ranger*, 12 Sim.

This is in accordance with the rules heretofore announced with

118; *Ex p. James*, 8 Ves. Jr. 337; *Nelthorpe v. Pennymann*, 14 Ves. Jr. 517.

*United States*.—*Stockton v. Ford*, 11 How. 232, 13 U. S. (L. ed.) 676; *Byers v. Surget*, 19 How. 303, 15 U. S. (L. ed.) 670; *Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 U. S. (L. ed.) 932.

*Alabama*.—*Pearce v. Gamble*, 72 Ala. 341. See also *Phillips v. Benson*, 82 Ala. 500, 2 So. 93.

*Arkansas*.—*Wright v. Walker*, 30 Ark. 44, purchase at tax sale.

*California*.—*Fisher v. McInerney*, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

*Colorado*.—*Owers v. Olathe Silver Min. Co.*, 6 Colo. App. 1, 39 Pac. 980.

*Georgia*.—*Crayton v. Spullock*, 87 Ga. 326, 13 S. E. 561; *Kreitzer v. Crovatt*, 94 Ga. 694, 21 S. E. 585.

*Illinois*.—*Moore v. Bracken*, 27 Ill. 23; *Zeigler v. Hughes*, 55 Ill. 288.

*Iowa*.—*Harper v. Perry*, 28 Ia. 57; *Howard v. Kelly*, 137 Ia. 76, 114 N. W. 544, 126 Am. St. Rep. 274.

*Kansas*.—*Cunningham v. Jones*, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

*Kentucky*.—*Scott v. Wickliffe*, 1 B. Mon. 353; *Buscy v. Hardin*, 2 B. Mon. 407; *Smith v. Thompson*, 7 B. Mon. 305; *Forman v. Hunt*, 3 Dana 617; *Howell v. McCreery*, 7 Dana 388; *Phillips v. Phillips*, 80 S. W. 826, 26 Ky. L. Rep. 145, *rehearing denied* 81 S. W. 689, 26 Ky. L. Rep. 415; *Malone v. Lebus*, 96 S. W. 519. See *Salter v. Dunn*, 1 Bush 311; *Duvall v. Waggener*, 2 B. Mon. 183.

*Louisiana*.—*Railsback v. Leonard*, 118 La. 916, 43 So. 548.

*Michigan*.—*Taylor v. Young*, 56 Mich. 285, 22 N. W. 799; *Culver v. Nester*, 116 Mich. 191, 74 N. W. 532; *Boardman v. Boozewinkel*, 121 Mich. 320, 80 N. W. 37.

*Mississippi*.—*Johnson v. Outlaw*, 56 Miss. 541; *Sullivan v. Walker*, 12 So. 250.

*Missouri*.—*Warren v. Hawkins*, 49 Mo. 137; *Ward v. Brown*, 87 Mo. 468; *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; *Bucher v. Hohl*, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492; *Burke v. Daly*, 14 Mo. App. 542; *Edwards v. Gottschalk*, 25 Mo. App. 549; *Wilber v. Robinson*, 29 Mo. App. 157; *Aultman, etc., Co. v. Loring*, 76 Mo. App. 66.

*Nebraska*.—*Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

*New York*.—*In re Friedman*, 27 Hun 301; *Johnstone v. O'Connor*, 21 App. Div. 77, 47 N. Y. S. 425, *affirmed* 162 N. Y. 639, 57 N. E. 1113; *Bush v. Halsted*, 121 App. Div. 538, 106 N. Y. S. 133; *Hawley v. Cramer*, 4 Cow. 717; *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386; *Howell v. Baker*, 4 Johns. Ch. 118; *Giddings v. Eastman*, 5 Paige 561; *Wambaugh v. Gates*, 8 N. Y. 138; *Case v. Carroll*, 35 N. Y. 385; *O'Donnell v. Lindsay*, 39 Super Ct. 523.

*North Carolina*.—*Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415.

*Pennsylvania*.—*Leisenring v. Black*, 5 Watts 303, 30 Am. Dec. 322; *Deviney v. Norria*, 8 Watts, 314; *Downey v. Gerrard*, 3 Grant Cas. 64; *Barrett v. Bamber*, 9 Phila. 202, 31 Leg. Int. 164; *Elliott v. Tyler*, 6 Atl. 917.



respect to dealings between attorney and client,<sup>15</sup> to the effect that when an attorney is intrusted with litigation, the conduct of proceedings, or the management of any business, in which he is under the slightest obligation to look after and protect the interests of others, he will not be permitted to derive therefrom any personal benefit which conflicts in the least degree with that obligation and the protection of those interests.<sup>16</sup> An attorney purchasing in his own name at his client's execution sale, holds the property subject to the election of the client to take it on being fully informed of the facts.<sup>17</sup> So also where the attorney procures a third person to buy for him, or in whose purchase the attorney is interested.<sup>18</sup> The fact that a solicitor has a personal separate interest in the sale, does not estop his client from asserting its invalidity.<sup>19</sup> If it is necessary for an attorney to bid at such judicial sales to protect his own interests, he should obtain an order of court granting him permission to do so, and such order must be made on personal notice to his clients; or he may withdraw, before the sale, as counsel in the case.<sup>20</sup> Purchases of the character under consideration are at all times regarded with disfavor by the courts, and where they are accompanied by the fact that an inadequate price was paid by the attorney, it will require but slight evidence to warrant the setting aside of the sale either on the ground of fraud, or as being in contravention of public policy.<sup>1</sup> In all cases of this character if the

*Texas*.—*Thomas v. Morrison*, 92 Tex. 329, 48 S. W. 500, *modifying* 46 S. W. 46.

*Vermont*.—*Wheeler v. Willard*, 44 Vt. 640.

*Washington*.—*Gaffney v. Jones*, 18 Wash. 311, 51 Pac. 461.

*West Virginia*.—*Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin*.—*In re Taylor Orphan Asylum*, 36 Wis. 534; *Ellis v. Allen*, 99 Wis. 598, 74 N. W. 537, 75 N. W. 949.

<sup>15</sup> See *supra*, §§ 152–163.

<sup>16</sup> *Crayton v. Spullock*, 87 Ga. 326, 13 S. E. 561.

<sup>17</sup> *Smith v. Thompson*, 7 B. Mon.

(Ky.) 305; *Aultman, etc., Co. v. Loring*, 76 Mo. App. 66; *Olson v. Lamb*, 56 Neb. 114, 76 N. W. 433, 71 Am. St. Rep. 670. And see, *infra*, § 169.

<sup>18</sup> *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; *Bush v. Halsted*, 121 App. Div. 538, 106 N. Y. S. 133; *Miles v. Ervin*, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623; *Newcomb v. Brooks*, 16 W. Va. 32.

<sup>19</sup> *Wambaugh v. Gates*, 8 N. Y. 138.

<sup>20</sup> *Johnstone v. O'Connor*, 21 App. Div. 77, 47 N. Y. S. 425, *affirmed* 162 N. Y. 639, 57 N. E. 1113.

<sup>1</sup> *Busey v. Hardin*, 2 B. Mon. (Ky.)

transaction is attacked by the client, the attorney has the burden of showing that he acted honestly, fairly and equitably with the client, and that the price was adequate;<sup>3</sup> the rule in this respect being the same as that heretofore stated in another connection.<sup>3</sup> If, however, the fairness of the purchase is so established, it will be upheld.<sup>4</sup> The relation of attorney and client does not, of itself, authorize an attorney to purchase at a judicial sale for his client;<sup>5</sup> and if he does so, and any loss occurs by reason of the transaction, he cannot shift the burden of the loss upon his client after discovering that his purchase is not profitable.<sup>6</sup> But, if authorized

407; *Smith v. Thompson*, 7 B. Mon. (Ky.) 305; *Forman v. Hunt*, 3 Dana (Ky.) 617; *Howell v. McCreery*, 7 Dana (Ky.) 388; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118; *Leisenring v. Black*, 5 Watts (Pa.) 303, 30 Am. Dec. 322.

<sup>3</sup> *Savery v. Sypher*, 6 Wall. 157, 18 U. S. (L. ed.) 822; *Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043; *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682; *Reickhoff v. Brecht*, 51 Ia. 633, 2 N. W. 522; *Howell v. Ransom*, 11 Paige (N. Y.) 540.

<sup>4</sup> See *supra*, § 152.

<sup>5</sup> *United States*.—*The Ruby*, 38 Fed. 622.

*California*.—*Fisher v. McInerney*, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

*Illinois*.—*Hess v. Voss*, 52 Ill. 472; *Herr v. Payson*, 157 Ill. 244, 41 N. E. 732.

*Iowa*.—*Cavender v. Smith*, 1 Ia. 306; *Page v. Stubbs*, 39 Ia. 537; *Baker v. Davenport First Nat. Bank*, 77 Ia. 615, 42 N. W. 452.

*Louisiana*.—*Hyams v. Herndon*, 36 La. Ann. 879.

*Kansas*.—*Caldwell v. Bigger*, 76 Kan. 49, 90 Pac. 1095.

*Minnesota*.—*Rogers v. Gaston*, 43 Minn. 189, 45 N. W. 427.

*Missouri*.—*Grayson v. Weddle*, 63 Mo. 523; *Ewing v. Parrish*, 148 Mo. App. 492, 128 S. W. 538.

*Ohio*.—*Wade v. Pettibone*, 14 Ohio 557, *affirming* 11 Ohio 57, 37 Am. Dec. 408.

*Pennsylvania*.—*Dobbins v. Stevens*, 17 S. & R. 13; *Devinney v. Norris*, 8 Watts 314.

*South Carolina*.—*Le Conte v. Irwin*, 19 S. C. 554; *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517. Compare *McCelvey v. Thompson*, 7 S. C. 185.

*West Virginia*.—Compare *Newcomb v. Brooks*, 16 W. Va. 32.

<sup>6</sup> *United States*.—*Savery v. Sypher*, 6 Wall. 157, 18 U. S. (L. ed.) 822; *Fife v. Bohlen*, 22 Fed. 878; *Bauman v. Eschallier*, 184 Fed. 710, 107 C. C. A. 44.

*California*.—*Fisher v. McInerney*, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

*Kentucky*.—*Lasley v. Lackey*, 4 Ky. L. Rep. 896.

*New York*.—*Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386.

*Tennessee*.—*Washington v. Johnson*, 7 Humph. 468.

<sup>6</sup> *Warren v. Hawkins*, 49 Mo. 137.

to do so, there is no impropriety in an attorney representing his client at a judicial sale, and purchasing the property as such representative.<sup>7</sup>

**§ 167. Outstanding Titles.**—In accordance with the foregoing general rule,<sup>8</sup> an attorney's purchase of an outstanding title to his client's property, or to property in which his client is interested, will not be effective as against the client.<sup>9</sup> Such a purchase, and use thereof, against a client's interests, is a breach of professional duty of which an attorney will not be allowed to take advantage.<sup>10</sup> The rule is an unbending one that, when an attorney buys an outstanding or adverse title to land, as to which he has been consulted or employed, he buys for his client, if the client elects to take it,<sup>11</sup> even though the professional relation did not exist at the time the purchase was made;<sup>12</sup> but the client cannot be

<sup>7</sup> *Fabel v. Boykin*, 55 Ala. 383; *Estes v. Boothe*, 20 Ark. 583; *Rogers v. Rogers*, (Tenn.) 35 S. W. 890. See also *Russell v. Geyer*, 4 Mo. 384.

A city attorney who becomes a purchaser at a foreclosure sale for the nonpayment of a special assessment owes to the city and to the owner of the property a duty to exercise due care in locating the owner and to pursue such sources of inquiry as are open to him leading to the means of giving notice to the owner, and where the city attorney violates this duty, the sale may be avoided at the suit of the injured party. *Roger v. Whitham*, 56 Wash. 190, 21 Ann. Cas. 272, 105 Pac. 628, 134 Am. St. Rep. 1105.

<sup>8</sup> See *supra*, § 164.

<sup>9</sup> *United States v. Baker v. Humphrey*, 101 U. S. 494, 25 U. S. (L. ed.) 1065.

*Illinois v. Sutherland v. Reeve*, 41 Ill. App. 295.

*Indiana v. Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457.

*Iowa v. Byington v. Moore*, 62 Ia. 470, 17 N. W. 644.

*Mississippi v. Murphey v. Sloan*, 24 Miss. 659; *Winn v. Dillon*, 27 Miss. 496; *Cameron v. Lewis*, 56 Miss. 82, 601; *Sullivan v. Walker*, 12 So. 250.

*Missouri v. Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

*Pennsylvania v. Cleavinger v. Reimar*, 3 W. & S. 486; *Hockenbury v. Carlisle*, 5 W. & S. 348; *Galbraith v. Elder*, 8 Watts 81; *Smith v. Brotherline*, 62 Pa. St. 461.

*Vermont v. Davis v. Smith*, 43 Vt. 269.

<sup>10</sup> *Cameron v. Lewis*, 56 Miss. 601.

<sup>11</sup> *Gibbons v. Hoag*, 95 Ill. 45; *Aultman v. Loring*, 76 Mo. App. 66; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703; *Smith v. Brotherline*, 62 Pa. St. 461; *Davis v. Smith*, 43 Vt. 269.

<sup>12</sup> *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609;

compelled to take it.<sup>13</sup> An attorney whose client is engaged in litigation to enforce a claim against a decedent's estate, cannot purchase the residuary share of such estate.<sup>14</sup> Where an attorney purchases an outstanding title under a parol agreement to hold the land for his client, the trust will be enforced.<sup>15</sup> So, an attorney who procures a judgment for his client, knowing it to be invalid, and who assists and suffers him to purchase the property at an execution sale under such void judgment, is estopped from afterwards acquiring title to the same property from the judgment debtor.<sup>16</sup> And an attorney who is employed to sue a debt, attach real estate, procure a judgment, and levy the same on the land attached, is estopped from denying the validity of such proceedings, to his own profit or advantage; and if they are defective, and he purchases the land levied on, the title that he takes inures to the judgment creditor.<sup>17</sup> But if a client, having been advised by his attorney to purchase an outstanding title, declines to do so, the attorney may thereupon lawfully purchase the title either for himself,<sup>18</sup> or for a third person.<sup>19</sup> So, while an attorney may not buy, for himself, his client's property at a tax sale, he is not precluded

*Galbraith v. Elder*, 8 Watts (Pa.) 81. See also, *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457; *Cameron v. Lewis*, 56 Miss. 80.

Compare *Rogers v. Gaston*, 43 Minn. 189, 45 N. W. 427, wherein an attorney employed to foreclose a mortgage, upon examining the title, discovered that the mortgagor owned an undivided half interest in the premises. He notified the agent of his client, through whom he was employed, of the state of the title, and, under his instructions, bid off the premises at one-half of their supposed value, and for two years after his relations as attorney closed the mortgage had not purchased the outstanding interest or proposed to do so. It was held that it was no abuse of his privilege for the attorney then to purchase

the outstanding interest for himself; that the court would not, on the ground of his former relations with the mortgagee, declare him a trustee of the land for the latter. See also *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909.

<sup>13</sup> *Morrison v. Thomas*, 92 Tex. 329, 48 S. W. 500, *modifying* 46 S. W. 40. See also *supra*, § 169.

<sup>14</sup> *Stephens v. Dubois*, 31 R. I. 138, 76 Atl. 656, 140 Am. St. Rep. 741.

<sup>15</sup> *Hughes v. Willson*, 128 Ind. 491, 26 N. E. 50. See also *Edwards v. Gottschalk*, 25 Mo. App. 549.

<sup>16</sup> *Phillips v. Blair*, 38 Ia. 649.

<sup>17</sup> *Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387.

<sup>18</sup> *Webber v. Wannemaker*, 39 Colo. 425, 89 Pac. 780.

<sup>19</sup> *Humphrey v. Hurd*, 31 Mich. 436.

from buying the tax title when, in the absence of bad faith on his part, it has passed to others.<sup>20</sup>

**§ 168. Outstanding Claims.**—So with outstanding claims; an attorney cannot, consistently with his duty, purchase such claims against his client so as to reap an advantage from the transaction.<sup>1</sup> It is fundamental that the court will decree such a purchase to be held in trust for the client,<sup>2</sup> and it is absolutely immaterial whether the client's claim is a legal lien or not when the attorney buys it. The court, in such a case, will impress a lien and decree the trust.<sup>3</sup> An attorney at law is not disqualified from purchasing a claim against his client and enforcing it for his own benefit, when the transaction involves no duty or obligation to his client, and the purchase is made in good faith in the usual course of trade,<sup>4</sup> and he uses no information obtained as counsel, and takes no unfair advantage of his client, or his client's creditors.<sup>5</sup> The burden of establishing such good faith, if the transaction is attacked by the client, is on the attorney.<sup>6</sup>

<sup>20</sup> *Lynn v. Morse*, 76 Ia. 665, 39 N. W. 203. See also, *In re Maynard*, 1 Walk. (Pa.) 472; *Butcher v. Chidester*, 68 W. Va. 488, 69 S. E. 1009.

<sup>1</sup> *United States*.—*Stockton v. Ford*, 11 How. 247, 13 U. S. (L. ed.) 683; *Garinger v. Palmer*, 126 Fed. 906, 61 C. C. A. 436; *Stanwood v. Wishard*, 134 Fed. 959.

*California*.—*Sutliff v. Clunie*, 37 Pac. 224.

*Georgia*.—*Larey v. Baker*, 86 Ga. 468, 12 S. E. 684.

*Illinois*.—*McDowell v. Milroy*, 69 Ill. 498.

*Indiana*.—*Manhattan Cloak, etc., Co. v. Dodge*, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369.

*Louisiana*.—*Hoss's Succession*, 42 La. Ann. 1022, 8 So. 833.

*Missouri*.—*Hall v. Callahan*, 66 Mo. 316.

*Nebraska*.—*Olson v. Lamb*, 56 Neb.

104, 76 N. W. 433, 71 Am. St. Rep. 670.

*New York*.—*Hare v. DeYoung*, 39 Misc. 366, 79 N. Y. S. 868.

<sup>2</sup> *Gilbert v. Murphey*, 103 Fed. 520; *Stanwood v. Wishard*, 134 Fed. 959; *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130. See also *infra*, § 169.

<sup>3</sup> *Stanwood v. Wishard*, 134 Fed. 959.

<sup>4</sup> *Smith v. Craft*, 58 S. W. 500, 22 Ky. L. Rep. 643; *Powell v. Willamette Valley R. Co.*, 15 Ore. 393, 15 Pac. 663; *Sallade's Appeal*, 36 Pa. St. 429; *McKenna v. Van Blarcom*, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895; *First Nat. Bank v. Douglas County*, 124 Wis. 15, 4 Ann. Cas. 34, 102 N. W. 315.

<sup>5</sup> *Smith v. Craft*, 58 S. W. 500, 22 Ky. L. Rep. 643.

<sup>6</sup> See *supra*, § 151.

### § 169. Purchase Held to Be in Trust for Client.—

It will be observed that the rules stated in the preceding sections of this subdivision merely have the effect of prohibiting an attorney from purchasing the subject-matter of his employment to the detriment of his client:<sup>7</sup> they do not render such purchases absolutely void,<sup>8</sup> but only voidable, at the client's election.<sup>9</sup> Therefore, for the purpose of carrying into effect the propositions heretofore stated, it is an established rule that where an attorney does purchase, or otherwise acquire, an interest in the subject-matter of his employment adverse to that of his client, the attorney, in such case, will be deemed to have acted as a trustee for the benefit of such client.<sup>10</sup> The law will not stop to inquire into motives and

<sup>7</sup> See *supra*, §§ 164-168.

<sup>8</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 U. S. (L. ed.) 932; *Hess v. Voss*, 52 Ill. 472; *Herr v. Payson*, 157 Ill. 244, 41 N. E. 732; *Lynn v. Morse*, 76 Ia. 665, 39 N. W. 203; *Dobbins v. Stevens*, 17 S. & R. (Pa.) 13; *Deviney v. Norris*, 8 Watts (Pa.) 314; *Beall v. Chatham*, 100 Tex. 371, 99 S. W. 1116; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254.

<sup>9</sup> *Shanklin v. Meyler*, 5 Ky. L. Rep. 296; *Downey v. Gerrard*, 3 Grant Cas. (Pa.) 64; *Wheeler v. Willard*, 44 Vt. 640.

<sup>10</sup> *United States*.—*Stockton v. Ford*, 11 How. 232, 13 U. S. (L. ed.) 676; *Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043, *reversed* on other grounds 106 U. S. 586, 1 S. Ct. 617, 27 U. S. (L. ed.) 306; *Stanwood v. Wishard*, 134 Fed. 959.

*Alabama*.—*Pearce v. Gamble*, 72 Ala. 341; *Singo v. Brainard*, 173 Ala. 64, 55 So. 603.

*Georgia*.—*Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216.

*Illinois*.—*Moore v. Bracken*, 27 Ill. 23; *Zeigler v. Hughes*, 55 Ill. 288; *Alwood v. Mansfield*, 59 Ill. 496; *Mc-*

*Dowell v. Milroy*, 69 Ill. 498; *Sutherland v. Reeve*, 41 Ill. App. 295.

*Iowa*.—*Harper v. Perry*, 28 Ia. 57; *Phillips v. Blair*, 38 Ia. 649; *Reickhoff v. Brecht*, 51 Ia. 633, 2 N. W. 522. See also *Lynn v. Morse*, 76 Ia. 665, 39 N. W. 203.

*Kentucky*.—*Phillips v. Phillips*, 80 S. W. 826, *rehearing denied* 81 S. W. 689; *Malone v. Lebus*, 96 S. W. 519.

*Louisiana*.—*McMichael v. Davidson*, 7 Rob. 53; *Relf v. Ives*, 10 La. 509; *Hyams v. Herndon*, 36 La. Ann. 879; *Brigham v. Newton*, 49 La. Ann. 1539, 22 So. 777.

*Maine*.—*Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387.

*Michigan*.—*Taylor v. Young*, 56 Mich. 285, 22 N. W. 799; *Boardman v. Boozewinkel*, 121 Mich. 320, 80 N. W. 37, 6 Detroit Leg. N. 467; *Roberts v. Gates*, 146 Mich. 169, 109 N. W. 264, 13 Detroit Leg. N. 724.

*Mississippi*.—*Johnson v. Outlaw*, 56 Miss. 541; *Gaston v. King*, 63 Miss. 326; *Sullivan v. Walker*, 12 So. 250. See also *Christian v. O'Neal*, 46 Miss. 669.

*Missouri*.—*Bliss v. Prichard*, 67 Mo. 181; *Ward v. Brown*, 87 Mo.

intentions, nor to calculate whether, in fact, a profit has been made; but whenever advised that the attorney holds, as his own, property in relation to which he has been intrusted with guarding the interests of his client, it will compel him to hold as trustee and not as owner.<sup>11</sup> It seems that this rule also extends to the attorney's clerk.<sup>12</sup> A client has the right to treat all acts of his solicitor touching his interest, as having been done for his benefit;<sup>13</sup> and he is entitled to an accounting and to the benefit of any profits which the attorney has made from such transactions,<sup>14</sup> or he

468; *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L.R.A. 78; *Bucher v. Hohl*, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492; *Edwards v. Gottschalk*, 25 Mo. App. 549; *Wilber v. Robinson*, 29 Mo. App. 157; *Aultman v. Loring*, 76 Mo. App. 66.

*Nebraska*.—*Olson v. Lamb*, 56 Neb. 115, 76 N. W. 433, 71 Am. St. Rep. 670.

*New York*.—In *re Friedman*, 27 Hun 301; *Johnstone v. O'Connor*, 21 App. Div. 77, 47 N. Y. S. 425, *affirmed* 162 N. Y. 639, 57 N. E. 1113; *Nichols v. Riley*, 118 App. Div. 404, 103 N. Y. S. 554; *Hawley v. Cramer*, 4 Cow. 717; *Howell v. Baker*, 4 Johns. Ch. 118; *Giddings v. Eastman*, 5 Paige 561; *Case v. Carroll*, 35 N. Y. 385. See *Beardsley v. Root*, 11 Johns. 464, 6 Am. Dec. 386.

*Ohio*.—*Wade v. Pettibone*, 11 Ohio 57, 37 Am. Dec. 408, *bill of review dismissed* 14 Ohio 557.

*Pennsylvania*.—*Cleavinger v. Reimar*, 3 W. & S. 486; *Leisenring v. Black*, 5 Watts 303, 30 Am. Dec. 322; *Fisher v. Knox*, 13 Pa. St. 622, 53 Am. Dec. 503; *Downey v. Gerrard*, 3 Grant Cas. 64; *Albright v. Mercer*, 14 Pa. Super. Ct. 63; *Whitman v. O'Brien*, 29 Pa. Super. Ct. 208; *Lockhard v. McKinley*, 9 W. N. C. 11; *Barrett v. Bamber*, 9 Phila. 202, 31 Leg. Int. 164.

*Texas*.—*Henyan v. Trevino*, 137 S. W. 458.

*Vermont*.—See *Wheeler v. Willard*, 44 Vt. 640.

*West Virginia*.—*Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

*Wisconsin*.—In *re Taylor Orphan Asylum*, 36 Wis. 534; *O'Dell v. Rogers*, 44 Wis. 136.

<sup>11</sup> *Johnson v. Outlaw*, 56 Miss. 546.

<sup>12</sup> Thus where a mortgagee consulted a solicitor, who turned her over to his clerk to assist her gratuitously, and the clerk, by reason of the information derived during such employment, bought the mortgage for less than half the amount thereof, he was held to be a trustee for the benefit of the mortgagee. *Hobday v. Peters*, 28 Beav. (Eng.) 349. And see *supra*, § 165.

<sup>13</sup> *Wheeler v. Willard*, 44 Vt. 640.

<sup>14</sup> *Indiana*.—*Manhattan Cloak & Suit Co. v. Dodge*, 120 Ind. 1, 21 N. E. 344, 6 L.R.A. 369.

*Iowa*.—*Byington v. Moore*, 62 Iowa 470, 17 N. W. 644.

*Kentucky*.—*Scott v. Wickliffe*, 1 B. Mon. 353.

*Mississippi*.—*Gaston v. King*, 63 Miss. 326.

*Nebraska*.—*Levara v. McNeny*, 5 Neb. (unofficial) Rep. 318, 98 N. W. 679, *modified* 73 Neb. 414, 102 N. W. 1042.

may have them set aside,<sup>15</sup> unless the attorney establishes the *bona fides* of his conduct within the rule heretofore stated.<sup>16</sup>

§ 170. Rights of Third Persons. — It is clear from the foregoing sections that the purpose of the rule forbidding an attorney to purchase property in which his client, as such, is interested, is essentially for the attorney's protection. Except as against the client, the purchase is valid.<sup>17</sup> Thus a third party cannot set up the title of the client in defense of a suit brought by the attorney for possession of the land.<sup>18</sup> And where an attorney purchases for his own benefit, a title adverse to that of his client, he is not liable to an action in favor of a subsequent grantee of his client.<sup>19</sup> So, also, where an attorney's purchase is voidable as to his client, it is also voidable as to third persons who, with notice of the client's equities, purchase the premises from such attorney;<sup>20</sup> and the heirs of the attorney will take property, so acquired by him, subject to the trust in favor of the client, even though they had no notice of the circumstances under which the attorney purchased.<sup>1</sup> A *bona fide* purchase from the attorney for value, however, without notice of the client's equities, is entitled to protection;<sup>2</sup> so, also, such

*New York.*—In re Friedman, 27 Hun 301; Giddings v. Eastman, 5 Paige 561.

*Pennsylvania.*—In re Maynard, 1 Walk. 472; Albright v. Mercer, 14 Pa. Super. Ct. 63.

*Washington.*—Gaffney v. Jones, 18 Wash. 311, 51 Pac. 461.

<sup>15</sup> Valentine v. Stewart, 15 Cal. 387; Prouty v. Bullard, 77 Iowa 42, 41 N. W. 559; Lasley v. Lackey, 4 Ky. L. Rep. 896; Howell v. Baker, 4 Johns. Ch. (N. Y.) 118; Newcomb v. Brooks, 16 W. Va. 32.

<sup>16</sup> See *supra*, § 152.

<sup>17</sup> Holland Trust Co. v. Hogan, 63 Hun 631 mem., 17 N. Y. S. 919; Whitman v. O'Brien, 29 Pa. Super. Ct. 208; Wilson v. Cantrell, 40 S. C. 114, 18 S. E. 517.

<sup>18</sup> Leach v. Fowler, 22 Ark. 143. See also Estes v. Boothe, 20 Ark. 583.

<sup>19</sup> Cowan v. Barret, 18 Mo. 257.

<sup>20</sup> Purcell v. Enright, 31 N. J. Eq. 74; Henry v. Raiman, 25 Pa. St. 354, 64 Am. Dec. 703.

*Record as Notice.*—The record showing the fact of a purchase by the attorney of the plaintiff in a judgment of property sold thereunder, for a price less than its amount, is constructive notice to a purchaser from the attorney of the implied trust in favor of the client, and fixes upon such purchaser the same trust. Barrett v. Bamber, 9 Phila. (Pa.) 202, 31 Leg. Int. 164.

<sup>1</sup> Giddings v. Eastman, 5 Paige (N. Y.) 561.

<sup>2</sup> Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444.



a purchase from the client would carry with it the client's equities as against the attorney.<sup>3</sup>

§ 171. **Effect of Client's Consent.** — The purchase of a client's property, or property in which he is interested, by the attorney, will be valid where the client consents thereto,<sup>4</sup> or ratifies it.<sup>5</sup> Such consent or ratification, however, must be explicit, and fairly obtained;<sup>6</sup> a consent fraudulently procured will not, of course, bind the client.<sup>7</sup>

§ 172. **Existence of Professional Relationship.** — The mere fact that one is an attorney does not prevent him from buying property with the same liberty exercised by others unless, of course, there is some statutory restriction in this regard;<sup>8</sup> it is only where a client is involved that the law undertakes to prohibit the attorney from becoming the purchaser of property to such client's detriment.<sup>9</sup> It is clear therefore that an attorney may purchase where the professional relation does not exist between him and the owner of, or a person interested in, the property which he desires to buy.<sup>10</sup>

<sup>3</sup> "The obligation of fidelity which an attorney owes to his client is a continuing one, so far as respects any matter which has once been professionally committed to the attorney's confidence; and when the matter involved is the title to land, good faith and public policy require that any existing adverse title, which the latter may thereafter purchase, shall be deemed to inure to the benefit of his client or his (the client's) vendee." *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457. See also *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703.

<sup>4</sup> *Fisher v. McInerney*, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68; *Page v. Stubbs*, 39 Iowa 537; *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164. And see *Rutland R. Co. v. Beique*, 37 Can. Sup. Ct. 303.

<sup>5</sup> *Olson v. Lamb*, 56 Neb. 104, 76 Attys. at L. Vol. I.—20.

N. W. 433, 71 Am. St. Rep. 670; *Johnstone v. O'Connor*, 162 N. Y. 639, 57 N. E. 1113, *affirmed* 21 App. Div. 77, 47 N. Y. S. 425.

<sup>6</sup> *Bucher v. Hohl*, 199 Mo. 320, 97 S. W. 922, 116 Am. St. Rep. 492.

<sup>7</sup> *Linsley v. Sinclair*, 24 Mich. 380.

<sup>8</sup> See *infra*, §§ 395–397.

<sup>9</sup> As to the creation and termination of the relation of attorney and client see *supra*, §§ 133–142.

<sup>10</sup> *England*.—*Mason's Hall Tavern Co. v. Nokes*, 22 L. T. N. S. 503; *Davis v. Freethy*, 24 Q. B. D. 519; *Guest v. Smythe*, L. R. 5 Ch. 551, 39 L. J. Ch. 536.

*United States*.—*Doster v. Scully*, 27 Fed. 782.

*Illinois*.—*Francisco v. Dove*, 231 Ill. 402, 83 N. E. 205.

*Louisiana*.—*Railsback v. Leonard*, 118 La. 916, 43 So. 548.

So where such professional relation, although it formerly existed, has ceased, the attorney again becomes free to purchase property irrespective of the fact that a former client is interested in, or owns, it; <sup>11</sup> providing, of course, that no unfair advantage is taken of the client.<sup>12</sup> This subject is also considered in connection with dealings between attorney and client.<sup>13</sup>

§ 173. *Laches.* — As heretofore stated in another connection,<sup>14</sup> while statutes of limitation are not controlling in this respect, nevertheless, the client's right to claim the benefit of a purchase made by his attorney must be exercised within a reasonable time; laches being recognized as an available defense where such claims are asserted.<sup>15</sup> A client must notify his attorney promptly of his elec-

*Michigan.*—Taylor v. Boardman, 24 Mich. 287.

*Mississippi.*—Christian v. O'Neal, 46 Miss. 669.

*Nebraska.*—Hall v. Strode, 19 Neb. 658, 28 N. W. 312.

*Pennsylvania.*—Ferree v. United Storage Co., 227 Pa. St. 41, 75 Atl. 838.

<sup>11</sup> *England.*—Coaks v. Boswell, 11 App. Cas. 232.

*Arkansas.*—Pack v. Crawford, 29 Ark. 489.

*California.*—Porter v. Peckham, 44 Cal. 204.

*Iowa.*—Baker v. Davis, 35 Iowa 184.

*Kansas.*—Caldwell v. Bigger, 76 Kan. 49, 90 Pac. 1095.

*Kentucky.*—Smith v. Craft, 58 S. W. 500, 22 Ky. L. Rep. 643.

*Minnesota.*—Rogers v. Gaston, 43 Minn. 189, 45 N. W. 427; Sandford v. Flint, 108 Minn. 399, 122 N. W. 315.

*Mississippi.*—Bowers v. Virden, 56 Miss. 595.

*Pennsylvania.*—Devinney v. Norris, 8 Watts 314.

*South Carolina.*—Wilson v. Cantrell, 40 S. C. 114, 18 S. E. 517.

*South Dakota.*—Grantz v. Deadwood Terra Mining Co., 17 S. D. 61, 95 N. W. 277.

*West Virginia.*—Williams v. Maxwell, 45 W. Va. 297, 31 S. E. 909.

<sup>12</sup> See generally § 164 et seq.

<sup>13</sup> See *supra*, § 152.

<sup>14</sup> See *supra*, § 162.

<sup>15</sup> *United States.*—Marsh v. Whitmore, 21 Wall. 178, 22 U. S. (L. ed.) 482.

*Illinois.*—Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 360; Herr v. Payson, 157 Ill. 244, 41 N. E. 732. Compare Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130.

*Iowa.*—Page v. Stubbs, 39 Ia. 537; Eckrote v. Myers, 41 Ia. 324.

*Kansas.*—Wills v. Wood, 28 Kan. 400.

*Minnesota.*—Rogers v. Gaston, 43 Minn. 189, 45 N. W. 427.

*Mississippi.*—Johnson v. Outlaw, 56 Miss. 547.

*Missouri.*—Bliss v. Prichard, 67

tion to claim the benefit of the purchase, especially where delay will affect the position of the parties or the value of the property.<sup>16</sup> The client cannot, however, be charged with laches until he has, or should have had, knowledge of the facts.<sup>17</sup>

### *Representing Conflicting Interests.*

§ 174. **General Rule.** — It is a well-settled general rule that an attorney cannot represent conflicting interests, or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from, or enter the service of, those whose interests are adverse to his client in the same controversy, or in matters so closely allied thereto as to be, in effect, a part thereof.<sup>18</sup> The rule is a rigid one,

Mo. 181; *Ward v. Brown*, 87 Mo. 468; *Wilber v. Robinson*, 29 Mo. App. 157.

*New York.*—*Hawley v. Cramer*, 4 Cow. 717.

*Ohio.*—*Wade v. Pettibone*, 11 Ohio 57, 37 Am. Dec. 408, *bill of review dismissed* 14 Ohio 557.

*West Virginia.*—*Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

<sup>16</sup> *Johnson v. Outlaw*, 56 Miss. 541; *Ward v. Brown*, 87 Mo. 468; *Wilber v. Robinson*, 29 Mo. App. 157.

<sup>17</sup> *Aultman v. Loring*, 76 Mo. App. 66.

<sup>18</sup> *England.*—*Davies v. Clough*, 8 Sim. 262; *Cholmondeley v. Clinton*, 19 Ves. Jr. 261, *Coop. t. Eld.* 80.

*Canada.*—*Ex p. Philip*, 26 N. Bruns. 178; *Re Charles Stark Co.*, 15 Ont. Pr. 471. See also *Fraser v. Halifax, etc., R. Co.*, 18 Nova Scotia 23; *Beatty v. Haldan*, 10 Ont. 278; *Re Joseph Hall Mfg. Co.*, 10 Ont. Pr. 485.

*United States.*—*Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *U. S. v. Costen*, 38 Fed. 24; *In re Boone*, 83 Fed. 944; *Lalace, etc.*,

*Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197; *In re Wooten*, 118 Fed. 670.

*Alabama.*—*Agnew v. Walden*, 84 Ala. 502, 4 So. 672; *Parker v. Parker*, 99 Ala. 230, 13 So. 520, 42 Am. St. Rep. 48.

*California.*—*Valentine v. Stewart*, 15 Cal. 387; *DeCelis v. Brunson*, 53 Cal. 372; *In re Cowdery*, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445; *Perkins v. West Coast Lumber Co.*, 129 Cal. 427, 62 Pac. 57; *Bryant v. McIntosh*, 3 Cal. App. 95, 84 Pac. 440.

*Connecticut.*—*In re Premier Cycle Mfg. Co.*, 70 Conn. 473, 39 Atl. 800.

*Georgia.*—*Kidd v. Huff*, 105 Gr. 209, 31 S. E. 430.

*Hawaii.*—*Matter of Magoon*, 16 Hawaii 761.

*Illinois.*—*Strong v. International Bldg., etc., Union*, 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792, *affirming* 82 Ill. App. 426; *Heffron v. Flower*, 35 Ill. App. 200.

and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights of the interest which he should alone represent.<sup>19</sup> An attorney is bound at all times to hold himself in readiness to render professional aid to his client, unembarrassed by any such complications as an allegiance to other interests would present.<sup>20</sup>

*Indiana*.—Wilson v. State, 16 Ind. 392; Price v. Grand Rapids, etc., R. Co., 18 Ind. 137; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422.

*Iowa*.—State v. Halstead, 73 Ia. 376, 35 N. W. 457; Shoemaker v. Smith, 80 Ia. 655, 45 N. W. 744; In re Cummings, 120 Ia. 421, 94 N. W. 1117; Whitcomb v. Collier, 133 Ia. 303, 110 N. W. 836.

*Kansas*.—McArthur v. Fry, 10 Kan. 233.

*Kentucky*.—Ball v. Poor, 81 Ky. 26.

*Massachusetts*.—Gordon v. Green, 113 Mass. 250; Provident Sav. Inst. v. White, 115 Mass. 112. See also Com. v. Gibbs, 4 Gray 146; Keyes v. McKerrow, 180 Mass. 261, 62 N. E. 259.

*Michigan*.—Eriggs v. Withey, 24 Mich. 136.

*Mississippi*.—Spinks v. Davis, 32 Miss. 154; Jenkins v. Barber, 85 Miss. 666, 38 So. 36.

*Missouri*.—MacDonald v. Wagner, 5 Mo. App. 56.

*New York*.—Sherwood v. Saratoga, etc., R. Co., 15 Barb. 650; Herrick v. Catley, 30 How. Pr. 208, 1 Daly 512; Hatch v. Fogerty, 40 How. Pr. 492; Hare v. DeYoung, 39 Misc. 366, 79 N. Y. S. 868.

*North Carolina*.—Wilson Cotton

Mills v. C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431; Marcom v. Wyatt, 117 N. C. 129, 23 S. E. 169.

*Ohio*.—Wilson v. Jennings, 3 Ohio St. 528.

*Tennessee*.—Cantrell v. Chism, 5 Sneed 116.

*Washington*.—Clarke County v. Clarke County, 1 Wash. Ter. 250; Nickels v. Griffin, 1 Wash. Ter. 374.

<sup>19</sup> Strong v. International Building, etc., Union, 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792.

No matter how high his motives or how honorable his intention, "no man can serve two masters; for either he will hate the one, and love the other; or he will hold to the one, and despise the other." Neither can a man ride two horses going in opposite directions at the same time. It is useless to attempt it. Fidelity must and will be required from all those holding fiduciary relations. They must not lightly enter upon such relationships, but, if they do, they will not be permitted to be disloyal; and of all species of disloyalty desertion and adherence to the enemy or to the opposing party in a suit is recognized as the worst. Murray v. Lizotte, 31 R. I. 509, 77 Atl. 231.

<sup>20</sup> Quinn v. Van Pelt, 36 Super. Ct. (N. Y.) 279.

He can undertake no adverse employment no matter how honest may be his motives and intentions,<sup>1</sup> or even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment.<sup>2</sup> He "oweth to his client fidelity, secrecy, diligence, and skill, and cannot take a reward on the other side."<sup>3</sup> Attorneys at law are not such mere mercenaries that they may desert the cause of those for whom they are enlisted, and take service on the other side, for no other reason than that their fees are not wholly paid. They are not bound to serve those who will not pay them, and may withdraw from the service of such, but they cannot take employment from the adverse party.<sup>4</sup> Nor can the members of a firm of attorneys represent opposite sides of the same cause without the knowledge and consent of their clients.<sup>5</sup> A power of attorney given to the plaintiff's attorney by the defendant, authorizing him to enter defendant's appearance, is void as against public policy.<sup>6</sup>

**§ 175. Extent and Application of Rule.** — In applying the foregoing general rule it has been held that an attorney who is the executor or administrator of an estate, cannot act as counsel for clients whose interests are adverse to those of the estate with which he is so identified; thus he cannot represent one who prosecutes a claim against the estate.<sup>7</sup> A contract by which an attorney takes a claim against an estate for collection, and to that end agrees to administer on such estate, is void as against public policy, and no

<sup>1</sup> Strong v. International Building, etc., Union, 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792; National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561; Arrington v. Arrington, 116 N. C. 170, 21 S. E. 181.

<sup>2</sup> Peirce v. Palmer, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>3</sup> Per Chief Justice Hobart in Herrick v. Catley, 30 How. Pr. (N. Y.) 208.

*Under a Massachusetts chancery rule no solicitor or counsel for the plaintiff can appear, or be heard, or act for or on behalf of any or either*

*of the defendants in bills of interpleader, or in the nature of interpleader.* Houghton v. Kendall, 7 Allen 72; Gordon v. Green, 113 Mass. 259; Provident Sav. Inst. v. White, 115 Mass. 112.

<sup>4</sup> State v. Halstead, 73 Ia. 376, 35 N. W. 457; Gooch v. Peebles, 105 N. C. 411, 11 S. E. 415.

<sup>5</sup> Ostrander v. Capitol Invest., etc., Assoc., 130 Mich. 312, 89 N. W. 964; Cox v. Barnes, 45 Neb. 172, 63 N. W. 394.

<sup>6</sup> Ball v. Poor, 4 Ky. L. Rep. 746.

<sup>7</sup> Jones v. Boulware, 39 Tex. 367.

action can be maintained against the attorney for his failure to collect the debt.<sup>8</sup> Where an attorney, in his capacity as administrator of an estate, filed a bill against a former client, which brought into question the validity of a deed made during the professional relationship, the defendant was allowed to suggest that relationship in his answer, although it should properly have been urged before the surrogate as an objection to the appointment of the attorney as administrator.<sup>9</sup> Counsel who appear for an executor or trustee in cases brought for the construction of wills, ought not to appear and act for legatees and devisees under the will.<sup>10</sup> So, an attorney for the executors of an estate is disqualified to represent the heirs for the purpose of supervising the proceedings of the executors with reference to distribution.<sup>11</sup> Nor can an attorney appear both for an administrator, on his petition for permission to sell his intestate's land to pay the debts of the estate, and also for the guardian of a minor heir.<sup>12</sup> So, on a bill filed by a widow to compel the settlement of the estate of her deceased husband, the defendant's solicitor cannot properly represent the minor heirs, their interests being adverse to that of the defendant.<sup>13</sup> Where an attorney has been employed by a wife to secure a separation from her husband, he cannot engage with the husband to act as his attorney in preventing it.<sup>14</sup> And on the hearing of a motion to set aside a judgment annulling a marriage, the same counsel cannot represent both parties.<sup>15</sup> So, also, a solicitor in a case cannot act as special master to execute the decree;<sup>16</sup> but it has been held that a master in chancery, who granted a preliminary injunction in a suit to enjoin certain taxes, is competent to appear as counsel for the defendant in subsequent proceedings in the same action.<sup>17</sup> Nor can a referee accept employment from one of the

<sup>8</sup> *Spinks v. Davis*, 32 Miss. 152.

<sup>9</sup> *Lawrence v. Lawrence*, 4 Edw. (N. Y.) 357.

<sup>10</sup> *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Smith v. Jordan*, 77 Conn. 469, 59 Atl. 507;

<sup>11</sup> *Bryant v. McIntosh*, 3 Cal. App. 95, 84 Pac. 440.

<sup>12</sup> *Marcom v. Wyatt*, 117 N. C. 129, 23 S. E. 169.

<sup>13</sup> *Parker v. Parker*, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48.

<sup>14</sup> *Herrick v. Catley*, 30 How. Pr. (N. Y.) 208, 1 Daly 512.

<sup>15</sup> *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623.

<sup>16</sup> *White v. Haffaker*, 27 Ill. 349.

<sup>17</sup> *Barrett v. Waters*, 19 Ill. App. 652.

litigants in an action which has been referred to him.<sup>18</sup> The foregoing general rule has also been applied to matters other than those which call for the rendition of professional services. An attorney should not permit himself to be retained in a cause with which his personal interests conflict; nor should he accept positions or occupations of a nonprofessional character, the duties of which may reasonably be supposed to be adverse to his client's interests.<sup>19</sup> Thus the interests of the state insurance department, and the companies under its control, being so divergent, the attorney of the former cannot accept a salaried position with one of such companies.<sup>20</sup> Nor can the trustee under a deed of assignment act as attorney for a creditor thereunder.<sup>1</sup> So where a solicitor general has, during his term of office, instituted a prosecution against a defendant, by preferring a bill of indictment against him for a violation of the law, public policy forbids that, after his term of office expires, he should be allowed to be employed as counsel for such defendant on his trial for the offense charged in such indictment.<sup>2</sup> Of course, the mere fact that an attorney was, or is, incidentally connected with adverse interests does not of itself disqualify him. He is at liberty to act for new clients whenever their interests are not necessarily adverse to those of his old clients, and he is not called upon to use, or take advantage of, the confidential communications of the former client for the benefit of the new one.<sup>3</sup> Thus one who acted as commissioner to examine and allow claims against an insolvent savings bank, is not disqualified

<sup>18</sup> *Stebbins v. Brown*, 65 Barb. (N. Y.) 272.

<sup>19</sup> *Jenkins v. Barber*, 85 Miss. 666, 38 So. 36; *Annely v. De Saussure*, 12 S. C. 507. See also *Kelley v. Mc-Minniman*, 58 N. H. 288. And see the cases cited *infra*, under § 176.

<sup>20</sup> So held independently of statutory provisions. In *re Bowman*, 7 Mo. App. 569.

<sup>1</sup> *Wilson Cotton Mills v. C. C. Randleman Cotton Mills*, 116 N. C. 647, 21 S. E. 431.

<sup>2</sup> *Gaulden v. State*, 11 Ga. 47.

<sup>3</sup> *United States*.—*Shaw v. Bill*, 95 U. S. 10, 24 U. S. (L. ed.) 333; In *re McKenna*, 137 Fed. 611.

*Alabama*.—*Cargile v. Ragan*, 65 Ala. 287; *Ex p. Randall*, 149 Ala. 640, 42 So. 870.

*California*.—*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; In *re Jones*, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; *Goad v. Hart*, 128 Cal. 197, 60 Pac. 761, 964; *Perkins v. West Coast Lumber Co.*, 129 Cal. 427, 62 Pac. 57; *Van Loben Sels v. Bunnell*, 131 Cal. 489, 63 Pac. 773; In *re*

from acting as attorney for the assignee.<sup>4</sup> So, the mere fact that an attorney is employed as an agent to negotiate loans, does not preclude him from rendering professional services to his principal.<sup>5</sup> The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one.<sup>6</sup> And where attorneys, in the settlement of a partnership account, represent the interest of two of the partners until a conflict arises between them, and then devote their services to only one of said partners, compensation will be awarded to the attorneys, as against the other partner, up to the time when they abandoned his cause.<sup>7</sup> When the plaintiff chooses to sign a paper authorizing the attorney for the defendant to dismiss the case, the presentation of said paper to the court by the attorney for the defendant is not forbidden.<sup>8</sup>

Healy, 137 Cal. 474, 70 Pac. 455; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008.

Connecticut.—Merwin v. Richardson, 52 Conn. 223.

Indiana.—Price v. Grand Rapids & I. R. Co., 18 Ind. 137.

Iowa.—Humphrey v. Darlington, 15 Ia. 207; State v. Lewis, 96 Ia. 286, 65 N. W. 295.

Kentucky.—Graves v. Long Assoc. 87 Ky. 441, 9 S. W. 297.

Louisiana.—Fly v. Noble, 37 La. Ann. 667.

Massachusetts.—Elastic Tip Co. v. Graham, 185 Mass. 597, 71 N. E. 117; Peckham v. Ramsey, 208 Mass. 112, 94 N. E. 290.

Michigan.—Schall v. Bly, 43 Mich. 401, 5 N. W. 651.

Missouri.—Flynn v. Neosho, 114 Mo. 567, 21 S. W. 903; Bent v. Priest, 10 Mo. App. 543; Stone v. Slattery, 71 Mo. App. 442.

Nebraska.—Musselman v. Barker, 26 Neb. 737, 42 N. W. 759.

New York.—Longenecker v. Kuhn,

126 App. Div. 254, 110 N. Y. S. 517.

Pennsylvania.—Egolf Building & Loan Assoc. v. Cleaver, 228 Pa. St. 60, 77 Atl. 245.

Texas.—Ingenhuett v. Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310; Deering v. Hurt, 2 S. W. 42.

Vermont.—Hobart v. Vail, 80 Vt. 152, 66 Atl. 820. See also Middlebury Bank v. Rutland, 33 Vt. 414.

Washington.—Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

Wisconsin.—Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

<sup>4</sup> Hall v. Brackett, 60 N. H. 215. And see the cases cited *infra*, under § 176.

<sup>5</sup> Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

<sup>6</sup> Hobart v. Vail, 80 Vt. 152. 66 Atl. 820.

<sup>7</sup> Sweeney v. Kerr, 25 S. W. 273, 16 Ky. L. Rep. 33.

<sup>8</sup> Ex p. Randall, 149 Ala. 640, 42 So. 870.



An attorney in whose hands a debt has been placed for collection, may act as the attorney in fact of the debtor to confess judgment, the debtor being advised of the extent of the attorney's agency for the creditor, and executing the power to avoid costs of suit.<sup>9</sup> Nor is a mere stockholder precluded from sustaining the relation of attorney to the company whose stock he holds.<sup>10</sup> An attorney holding a mortgage second to that of his client, violates no professional obligation by redeeming after the foreclosure of his client's mortgage, and his retirement from the case.<sup>11</sup> So, also, the attorney for the mortgagee in a foreclosure suit may properly appear as attorney for a purchaser of the equity of redemption.<sup>12</sup> A receiver may without impropriety be represented by the attorney of a party, where the interests of the receiver and such party are not adverse.<sup>13</sup> While judicial policy discourages the practice of attorneys acting at the same time for the bankrupt and his creditors, the bankruptcy act does not forbid a creditor to employ the attorney who acted as such for the bankrupt in the preparation of his consent to an adjudication.<sup>14</sup> And where there are no conflicting interests between a bankrupt and the trustee, a contract between the bankrupt's attorney and such trustee for services in collecting debts due the bankrupt estate is not against public policy.<sup>15</sup> So, the attorney for

<sup>9</sup> *Wassell v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245.

But see *Askew v. Goddard*, 17 Ill. App. 377, wherein it was held that an attorney signing a cognovit under a warrant authorizing any attorney at law to confess judgment for a certain sum and a reasonable attorney's fee cannot, at the same time, act as attorney for plaintiff.

<sup>10</sup> *Barker v. Cairo, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 329.

<sup>11</sup> *Sheehan v. Farwell*, 135 Mich. 196, 97 N. W. 728.

<sup>12</sup> *Wallace v. Furber*, 62 Ind. 103.

<sup>13</sup> *Smith v. New York Consol. Stage Co.*, 28 How. Pr. (N. Y.) 277, 18 Abb. Pr. 419.

But see *Heffron v. Flower*, 35 Ill. App. 200, wherein it was held that a receiver appointed in proceedings for the dissolution of a partnership should not employ the attorney for the complainants in the proceedings. See also *J. W. Butler Paper Co. v. J. L. Regan Printing Co.*, 35 Ill. App. 152; *Warren v. Sprague*, 4 Edw. (N. Y.) 416.

<sup>14</sup> *In re Kaufman*, 179 Fed. 552.

But see *In re Wooten*, 118 Fed. 670, wherein it was said that the attorney for a bankrupt should not also act for a creditor whose claim is contested.

<sup>15</sup> *Keyes v. McKerrow*, 180 Mass. 261, 62 N. E. 259, wherein attention is called to a rule of court which now forbids this practice.

a bankrupt may also appear in the proceedings for a creditor on a re-examination of his claims.<sup>16</sup>

**§ 176. Test as to Whether Interests Are Conflicting. —**

The question as to whether there is any inconsistency in representing particular interests must depend largely upon the facts presented by each case; the best means of determining the existence of a conflict is whether, at any stage of the proceedings, an attorney's duty to one interest will compel him to assail or neglect the other; if so, he must decline to represent one or the other.<sup>17</sup> The test of inconsistency is not whether the attorney has ever been retained by the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection.<sup>18</sup> It may prove to be a very difficult matter to determine, as concrete questions arise, whether lawyers can or cannot safely act for a new client; whether in doing so they may not unintentionally, and perhaps unconsciously, put at his service confidential information obtained from the old client by reason of the professional relation-

<sup>16</sup> *In re Morgan*, 8 Ben. 232, 17 Fed. Cas. No. 9,798.

<sup>17</sup> *Arkansas*.—*Beal, etc., Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58.

*California*.—*Jones v. Lamont*, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251.

*Kentucky*.—*Graves v. Long*, 87 Ky. 441, 9 S. W. 297.

*Michigan*.—*Cadillac State Bank v. Wexford Circuit Judge*, 139 Mich. 126, 102 N. W. 607.

*Mississippi*.—*Spinks v. Davis*, 32 Miss. 154.

*Missouri*.—*Stone v. Slattery*, 71 Mo. App. 442.

*Pennsylvania*.—*Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

*Vermont*.—*Hobart v. Vail*, 80 Vt. 152, 66 Atl. 820.

*Wisconsin*.—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

<sup>18</sup> *In re Boone*, 83 Fed. 944; *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197; *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137; *Bent v. Priest*, 10 Mo. App. 543; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

ship. Ordinarily the court will assume that counsel will decide that question for themselves in scrupulous conformity to their professional obligations. The path of unquestionable safety, however, would be found in abstention from participation, active or merely as advisers, in any business which may, even by unkind critics, be considered adverse to their clients' interests.<sup>19</sup> For if they become actively engaged for an interest hostile to that of a former client, they will be likely to find their progress impeded by pitfalls or quagmires into which they may stumble, or by which they may be besmirched.<sup>20</sup>

**§ 177. Effect of Former Retainer.** — An attorney is not permitted, in serving a new client as against a former one, to do anything which will injuriously affect the former client in any matter in which the attorney formerly represented him,<sup>1</sup> though the relation of attorney and client between them has been terminated,<sup>2</sup> and the new employment is in a different case;<sup>3</sup> nor can he use against him any knowledge or information gained through their former connection.<sup>4</sup> An attorney is never allowed to change sides in the same cause, though at different trials.<sup>5</sup> The good of the profession, as well as the safety of clients, demands the recognition and enforcement of these rules;<sup>6</sup> indeed it is not assuming too much to say that the proper administration of justice would soon cease if attorneys were permitted, after having received full, frank and free

<sup>19</sup> *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197.

<sup>20</sup> *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197.

<sup>1</sup> *In re Boone*, 83 Fed. 944; *Valentine v. Stewart*, 15 Cal. 387; *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445; *Com. v. Gibbs*, 4 Gray (Mass.) 146; *Sherwood v. Saratoga, etc., R. Co.*, 15 Barb. (N. Y.) 650; *Hatch v. Fogerty*, 40 How. Pr. (N. Y.) 492; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>2</sup> *In re Boone*, 83 Fed. 944.

<sup>3</sup> *In re Boone*, 83 Fed. 944.

<sup>4</sup> *U. S. v. Costen*, 38 Fed. 24; *In re Boone*, 83 Fed. 944; *People v. Spencer*, 61 Cal. 128; *In re Stephens*, 77 Cal. 357, 19 Pac. 646, 84 Cal. 77, 24 Pac. 46; *Hatch v. Fogerty*, 40 How. Pr. (N. Y.) 492, 10 Abb. Pr. N. S. 147, 33 Super. Ct. 166.

<sup>5</sup> *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137. And see the cases cited under the general rule, *supra*, § 174.

<sup>6</sup> *State v. Halstead*, 73 Ia. 376, 35 N. W. 457.

disclosures from clients, to go to the other side, no matter what the excuse which might be offered.<sup>7</sup>

**§ 178. Agreement Permitting Adverse Employment. —**

Of an agreement terminating the relations between a client and his attorney, and by which the client released the attorney "from all rights, burdens, obligations, and privileges which appertain to his said employment," and consented that he might engage his services "pro and con as he may see fit," the court said: "In determining that the present contract of release is void, I am guided by reasons of public policy, and by considerations which relate to the due and orderly administration of justice, to the honor and purity of the profession, to the protection of clients, and to the dignity of the court itself. Keeping these considerations in mind, I am firmly of the opinion that a contract, or waiver, or release, or consent, or by whatever name it may be styled, by which it is sought to release an attorney from all the duties, burdens, obligations, and privileges incident to the relation, is totally inoperative and void, and contrary to public policy. It is violative of every principle of professional honor and integrity. It is absolutely inconsistent with the duties, burdens, and obligations which an attorney assumes when he enters into the relation of attorney and client, and, in fact, is subversive of them. To uphold such a release as valid and effectual would be fraught with the most pernicious consequences both to the public and to the profession. It would give rise to most unscrupulous and unprofessional practices, and the rankest frauds could be perpetrated upon unsuspecting and improvident clients, and, perhaps, on the courts themselves. A client, in poor circumstances, could be imposed upon by a rich adversary. The inevitable result of such a doctrine would be to degrade the profession and bring the courts themselves into disrepute. The fact that a client may be willing to enter into such a contract does not justify the court in upholding it, nor can the client's consent or connivance shelter an attorney from unprofessional conduct. Courts owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot

<sup>7</sup> Whitcomb v. Collier, 133 Ia. 310, 110 N. W. 836.

supersede.”<sup>8</sup> This character of agreement, however, is not to be confused with the right of an attorney to act in his client's interest, for one against whom he has been retained; as, for instance, where the adverse party, with full knowledge of the facts, agrees to some amicable adjustment of the litigation.<sup>9</sup> But even here due care should be taken that the adverse party is fully aware of the significance of his actions; and often it will be found wise to insist on his having independent counsel. So too, a contract between an attorney and a third person, whereby the latter was to pay the former a commission for procuring a sale to him of the client's property, is not void, where the client consented to the arrangement.<sup>10</sup>

### § 179. Effect of Accepting Adverse Employment. —

Where an attorney improperly assumes to act for both parties, the injured litigant may, on discovery of the fact, repudiate the acts of his alleged attorney,<sup>11</sup> and rescind the contract of employment.<sup>12</sup> The law will not tolerate the same counsel to appear upon both sides of an adversary proceeding even colorably, and in general will not permit a judgment so affected to stand, if made the subject of exception in due time by the parties injured thereby.<sup>13</sup> Thus a proceeding to set aside a judgment will be dismissed where the same counsel jointly make the motion representing both parties to the action.<sup>14</sup> And where the attorney for executors and devisees also represents a claimant and procures judgment for the latter, such judgment will not be allowed to prevail, even though

<sup>8</sup> Per Morrow, Circuit Judge, in *In re Boone*, 83 Fed. 944.

<sup>9</sup> See *supra*, § 175.

<sup>10</sup> *Culver v. Nester*, 116 Mich. 191, 74 N. W. 532, 4 Detroit Leg. N. 1105.

<sup>11</sup> *Michigan Stove Co. v. Harwood Hardware Co.*, 71 Ill. App. 240.

<sup>12</sup> *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227.

<sup>13</sup> *In re Cowdery*, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep.

445; *Martindale v. Brock*, 41 Md. 571; *Moore v. Gidney*, 75 N. C. 34.

*Compare Shoemaker v. Smith*, 80 Ia. 655, 45 N. W. 744, wherein it was held that the fact that certain attorneys first appeared for one of the defendants, and, in violation of professional ethics, went over to the cause of the plaintiff, is no ground for reversing a judgment in favor of the plaintiff.

<sup>14</sup> *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623.

no fraud was intended or practiced.<sup>15</sup> A referee's report in favor of a party to an action pending before him, will be set aside where it appears that he was retained, as counsel, in other litigation, by the party in whose favor he decided; and, in such case, it is immaterial whether the decision of the referee was, or was not, affected by such retainer.<sup>16</sup> Where the solicitor for the plaintiff acknowledges service of process for the defendant, the court will refuse to enter up judgment on the pleadings.<sup>17</sup> So also a contract entered into between an attorney and a party whose interests are adverse to those of his client, is void as against public policy and cannot be enforced.<sup>18</sup> The representation of conflicting interests as a ground for disbarment will be considered hereafter.<sup>19</sup>

**§ 180. Restraining Attorney from Acting Adversely to Client.** — Where an attorney so far forgets, or ignores, his professional duty as to engage his services to one whose interests are necessarily in conflict with those of his client, or in whose employment he will be in position to take undue advantage of the confidential communications of such client, there is no doubt of the power of the court to enter and enforce an order restraining the attorney from so acting;<sup>20</sup> and this power can well be predicated, not alone on the fact that an attorney is an officer of the court,<sup>1</sup> but as well on the fact that such conduct is antagonistic to the due and orderly administration of justice.<sup>2</sup> The trial court not only has a right, but it is its duty, to forbid an attorney from changing sides in the

<sup>15</sup> *Arrington v. Arrington*, 116 N. C. 183, 21 S. E. 181. See also *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415.

<sup>16</sup> *Stebbins v. Brown*, 65 Barb. (N. Y.) 272.

<sup>17</sup> *Sleeper v. Sleeper*, 1 Handy (Ohio) 530.

<sup>18</sup> *Valentine v. Stewart*, 15 Cal. 387; *De Celis v. Brunson*, 53 Cal. 372; *McArthur v. Fry*, 10 Kan. 233; *MacDonald v. Wagner*, 5 Mo. App. 56; *Herrick v. Catley*, 1 Daly (N. Y.) 512, 30 How. Pr. 208; *Orr v. Tanner*, 12 R. I. 94.

<sup>19</sup> See *infra*, § 798.

<sup>20</sup> *In re Cowdery*, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Musselman v. Barker*, 26 Neb. 737, 42 N. W. 750.

<sup>1</sup> See *supra*, § 3.

<sup>2</sup> *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445; *Gaulden v. State*, 11 Ga. 47; *Nickels v. Griffin*, 1 Wash. Ter. 374.

same suit, though at different trials; for to do otherwise would defeat the very purpose for which courts were organized.<sup>3</sup> An attorney will not, of course, be restrained where the services which he intends to render to another are not adverse to his former client.<sup>4</sup> So, an attorney who has withdrawn from a case, believing, in good faith, that the litigation is ended, will not, in the event of its continuance, be enjoined from accepting a retainer from parties having an interest adverse to their former client, or from disclosing information acquired in their professional capacity from such client. In the absence of any showing to the contrary, the court will assume that such attorneys will observe all the obligations of honorable members of the bar.<sup>5</sup>

**§ 181. Civil and Criminal Proceedings Growing Out of Same Subject-Matter.** — The rule that an attorney cannot represent conflicting interests applies with undiminished force whether the parties represented, or proposed to be represented, pro and con, were formerly involved in a criminal prosecution the subject-matter of which later becomes the bone of contention in a civil action, or where the original employment was in the civil, and the subsequent retainer in the criminal, litigation.<sup>6</sup> But where an attorney who had been employed to defend a prosecution for bastardy, appeared for the plaintiff in an action brought by the prosecuting witness in the bastardy proceedings, against the same defendant, for damages for the breach of a promise of marriage, it was held that "while this record may not be considered as commendatory of the course sought to be pursued by the attorney named," yet his former retainer did not prevent him from so appearing.<sup>7</sup> This subject has been more fully considered in connection with the discussion relating to district and prosecuting attorneys.<sup>8</sup>

<sup>3</sup> *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445; *Wilson v. State*, 16 Ind. 392.

<sup>4</sup> *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137. See *supra*, § 176.

<sup>5</sup> *Lalancé & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197.

<sup>6</sup> *State v. Rucker*, 130 Ia. 239, 106 N. W. 645; *Com. v. Gibbs*, 4 Gray (Mass.) 146; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027.

<sup>7</sup> *Musselman v. Barker*, 26 Neb. 737, 42 N. W. 750.

<sup>8</sup> See *infra*, § 708.

§ 182. **Waiver of Objection.** — Where an attorney appears for one whose interests are adverse to those of his client, an objection should be entered thereto at the first reasonable opportunity, otherwise it will be presumed to have been waived.<sup>9</sup> Certainly one cannot sit idly by, omit to bring the facts to the knowledge of the court, take the chances on obtaining a favorable verdict, and, if unsuccessful, set up in another court, in a suit upon the judgment, that such judgment was procured by fraud.<sup>10</sup>

<sup>9</sup> *In re Premier Cycle Mfg. Co.*, 70

Conn. 473, 39 Atl. 800; *Webber v.*

*Barry*, 66 Mich. 127, 33 N. W. 289,

11 Am. St. Rep. 466.

<sup>10</sup> *Cox v. Barnes*, 45 Neb. 172, 63

N. W. 394.



## CHAPTER IX.

### LAW PARTNERSHIPS—ATTORNEYS AS WITNESSES—ADMISSIONS BY ATTORNEYS AS EVIDENCE.

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#### *Law Partnerships.*

§ 183. Generally. — The copartnership of members of the bar for the purpose of practicing law as a firm is not only lawful,<sup>1</sup>

<sup>1</sup> *Smith v. Hill*, 13 Ark. 173. Compare *Willson v. Willson*, 5 N. J. L. 791, wherein it was said that the New Jersey statute "declares, no man shall prosecute his suit except by himself or by a licensed attorney at law. Now, two joining themselves together in this way, though they both be licensed attorneys, cannot bring themselves within this description, and make one licensed attorney at law. The attorneys are considered as con-

but in many instances desirable, especially in the large cities.<sup>2</sup> Such firms are subject, *inter sese*, to the same rights, duties, and liabilities as other partnerships, and are governed by the same rules of law.<sup>3</sup> Thus notice to one member of the firm is notice to all, where it relates to the firm business.<sup>4</sup> So, also, the acts and ad-

fidential officers of the court; they receive fees, and are liable to penalties as such; and may be disbarred for malpractice. Can two, then, so conjoin themselves together as to receive the privileges of one, and be subject to the penalties of one? If there be malpractice in the conducting of a cause, shall they both be disbarred? and if not, which of them? Our statute does not contemplate such partnerships in official duties, and therefore they cannot lawfully exist. But though this be irregular, and might have been taken advantage of at the proper stage of the suit, yet after judgment it is certainly too late."

\*See generally the cases cited throughout this section.

A person employed to collect certain claims, under a contract entitling him to a percentage of the amount collected, is not a partner of an attorney whom he procures to prepare, file, and prove the claims before a certain court, agreeing to pay him a certain per cent of the amount recovered. *Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. 542, *affirming* 49 Hun 107, 1 N. Y. S. 823.

An *unlicensed person* may not become a partner of a law firm. *Dunn v. O'Reilly*, 11 U. C. C. P. 404.

<sup>2</sup> *Arkansas*.—*Smith v. Hill*, 13 Ark. 173.

*Iowa*.—*Starr v. Case*, 59 Iowa 491, 13 N. W. 645; *Roth v. Boies*, 139 Iowa 253, 115 N. W. 930.

*Louisiana*.—*Jones v. Caperton*, 15 La. Ann. 475.

*Massachusetts*.—*Holbrook v. Nesbitt*, 163 Mass. 120, 39 N. E. 794.

*New York*.—*Warner v. Griswold*, 8 Wend. 665.

*Pennsylvania*.—*Livingston v. Cox*, 6 Pa. St. 360.

One of two law partners has no authority to accept for the firm an agency for the mere sale of real estate. *Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 U. S. (L. ed.) 592.

Proof of money paid to a partner of one who was the creditor's attorney, but not to him, is not evidence of payment to his principal. *Brown v. Bull*, 3 Mass. 211.

*Unfair Settlement with One Partner*.—Settlement by one partner will not conclude the firm, if obviously unreasonable, or if the consideration, other than money, moves primarily to the personal benefit of the settling partner. In such cases the opposite party is so chargeable with notice of want of authority that he is held to act subject to the actual consent or approval of the absent partner. *Remington v. Eastern R. Co.*, 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

<sup>4</sup> *Wittenbrock v. Parker*, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L.R.A. 197; *Ganzer v. Schiffbauer*, 40 Neb. 638, 59 N. W. 98; *McFarland v. Crary*, 8 Cow. (N. Y.) 253;

missions of one of the partners, made in relation to and in the course of the firm's regular business, are binding upon the firm.<sup>5</sup> They are nontrading partnerships, however,<sup>6</sup> and therefore one member of the firm cannot bind his copartners by the making, acceptance, or indorsement of commercial paper, even for a partnership indebtedness,<sup>7</sup> unless he has express authority therefor from

*Green v. Milbank*, 3 Abb. N. Cas. (N. Y.) 138.

But see *St. Louis, etc., R. Co. v. Bennett*, 35 Kan. 395, 11 Pac. 155, holding that where an attorney, who is a member of a law firm composed of three persons, receives from a railway company a draft to deliver to a third person in the settlement of a lawsuit, and in such suit none of the members of the firm represented the railway company, or had anything to do with the case, a notice of an attorney's lien served upon the members of the firm, other than the one who actually received the draft, will not be notice upon the attorney receiving the draft, or make such attorney receiving the draft chargeable with negligence in delivering the draft according to his instructions, before the attorney serving notice of his lien has been paid or satisfied.

<sup>5</sup> *Alliance Bank v. Tucker*, 15 W. R. (Eng.) 992, 17 L. T. N. S. 13; *Smith v. Hill*, 13 Ark. 173; *Dyer v. Sutherland*, 75 Ill. 583; *Fitch v. Stamps*, 6 How. (Miss.) 487; *Bright v. Ross*, 11 Smed. & M. (Miss.) 289; *Green v. Milbank*, 3 Abb. N. Cas. (N. Y.) 138.

A member of a law firm acts within the scope of his powers in furnishing a surety on an attachment bond for a nonresident client, and receiving money from the client to indemnify

such surety. *Fornes v. Wright*, 91 Iowa 392, 59 N. W. 51.

<sup>6</sup> *England*.—*Hedley v. Bainbridge*, 3 Q. B. 316, 43 E. C. L. 752; *Levy v. Pyne*, C. & M. 453, 41 E. C. L. 249; *Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61; *Forster v. Mackreth*, L. R. 2 Exch. 163; *Garland v. Jacob*, L. R. 8 Exch. 216.

*Canada*.—*Wilson v. Brown*, 6 Ont. App. 411; *Workman v. McKinstry*, 21 U. C. Q. B. 623.

*Arkansas*.—*Alley v. Bowen-Merrill Co.*, 76 Ark. 4, 6 Ann. Cas. 127, 88 S. W. 838, 113 Am. St. Rep. 73.

*Florida*.—*Friend v. Duryee*, 17 Fla. 111, 35 Am. Rep. 89.

*Georgia*.—*Miller v. Hines*, 15 Ga. 197.

*Kentucky*.—*Breckenridge v. Shrieve*, 4 Dana 375.

*Massachusetts*.—*Marsh v. Gold*, 2 Pick. 285.

*Missouri*.—*St. Louis Third Nat. Bank v. Snyder*, 10 Mo. App. 211.

*Tennessee*.—*Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733.

*Wisconsin*.—*Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757.

<sup>7</sup> *Hedley v. Bainbridge*, 3 Q. B. 316, 43 E. C. L. 752; *Friend v. Duryee*, 17 Fla. 111, 35 Am. Rep. 89; *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757 (reviewing the earlier authorities).

"We gather from all of the author-

his copartner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of such an obligation, who sues upon it, to prove such authority, necessity or usage.<sup>8</sup> Law partnerships are, of course, subject to special regulation by statute or rule of court;<sup>9</sup> thus the partner of the judge of a minor court may be prohibited from practicing before him.<sup>10</sup> The liability of the firm for the acts of the individual partners,<sup>11</sup> and also matters relating to compensation,<sup>12</sup> have been considered elsewhere as indicated.

**§ 184. Retainer of Law Firms.**—The retainer of a law firm, as such, is equivalent to the retainer of all of its members;<sup>13</sup>

ities that the distinction between a trading and a nontrading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other, as the learned counsel for the plaintiff argued: but we think, and must so hold, that one partner in a nontrading partnership cannot bind his copartner by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes." *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757.

*Compare Livingston v. Cox*, 6 Pa. St. 360, wherein it was held that partnerships between attorneys are subject to the incidents to mercantile partnerships; and one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract.

<sup>8</sup> *Friend v. Duryee*, 17 Fla. 111, 35 Am. Rep. 89; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757.

In *Worster v. Forbush*, 171 Mass.

423, 50 N. E. 936, the court said: "An attorney at law who is a member of a partnership of lawyers has no implied authority by reason of the partnership to borrow money on the credit of the partnership, or to sign or indorse a negotiable promissory note in the name of the partnership; and it is immaterial that the money borrowed is used to pay the regular and ordinary expenses of the partnership, or that the holder of the note is a *bona fide* purchaser of the note for value before its maturity. . . . Any person taking a promissory note signed or indorsed in the name of a partnership by one partner in order to hold the other partners, has the burden of proving that the partner who signed the name was authorized by the other partners to sign or indorse notes."

<sup>9</sup> *Fox v. Jackson*, 8 Barb. (N. Y.) 355; In re Woodward, 4 Johns. (N. Y.) 289.

<sup>10</sup> *Fox v. Jackson*, 8 Barb. (N. Y.) 355.

<sup>11</sup> See *infra*, § 292.

<sup>12</sup> See *infra*, §§ 471-475.

<sup>13</sup> *Smith v. Hill*, 13 Ark. 174; *Lupton v. Taylor*, 39 Ind. App. 412, 78

the client cannot demand that any particular member of the firm shall render the services, or conduct the litigation, for which the firm was retained, but either partner may act.<sup>14</sup> The contract is joint, and continues to the termination of the suit, and neither partner can be released from the obligation, either by a dissolution of the firm, or by any other act or agreement among themselves;<sup>15</sup> therefore one member cannot, on dissolution of the partnership by death or otherwise, refuse to carry to completion executory contracts with clients which were in force at the date of dissolution.<sup>16</sup> So, the retainer of one of the partners, in the absence of any stipulation that he, alone, shall attend to the client's business, is a retainer of the firm;<sup>17</sup> and the client is entitled to have the benefit of their united skill and judgment in the management of his business.<sup>18</sup> If the client pays one member of the firm, he pays all.<sup>19</sup> Retainers generally have been considered heretofore.<sup>20</sup>

N. E. 689, 79 N. E. 523; *Eggleston v. Boardman*, 37 Mich. 14; *Ostrander v. Capitol Invest., etc., Assoc.*, 130 Mich. 312, 89 N. W. 964; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

In the absence of an express agreement to the contrary, any professional services rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm. *MacFarland v. Altschuler*, 77 Neb. 138, 108 N. W. 151.

Where one member of a law partnership obtained possession of a letter containing an authority to take care of the writer's interests, directed to the other partner, and acted under the instructions contained in the letter, it was held that the writer was bound by the act of the partner as much so as if the other partner had received the letter, and acted upon it. *Beck v. Martin*, 2 McM. L. (S. C.) 260.

<sup>14</sup> *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

But see *Schneible v. Travelers' Ins. Co.*, 36 Misc. 522, 73 N. Y. S. 955, wherein it was said that when the partnership is dissolved, a firm client has a right to determine which partner shall continue the conduct of an action already begun for him by the firm.

<sup>15</sup> *Tomlinson v. Polsley*, 31 W. Va. 108, 5 S. E. 457.

<sup>16</sup> *Walker v. Goodrich*, 16 Ill. 341; *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

*The removal from the country of one of a firm of attorneys does not permit the other member to refuse to carry out the firm's contracts to prosecute suits.* *Johnson v. Bright*, 15 Ill. 464.

<sup>17</sup> *Harris v. Pearce*, 5 Ill. App. 622; *Lockwood v. Dillenbeck*, 104 App. Div. 71, 93 N. Y. S. 321.

<sup>18</sup> *Smith v. Brittenham*, 109 Ill. 540.

<sup>19</sup> *Williams v. More*, 63 Cal. 50.

<sup>20</sup> See *supra*, §§ 133-136.

§ 185. **Dissolution.**—The dissolution of a law partnership may be effected in the same manner, and is governed by the same rules, as other partnerships.<sup>1</sup> Where an experienced attorney enters into partnership with a younger man in consideration of a premium, and thereafter excludes him from a knowledge of the details of the business and treats him with discourtesy, the younger lawyer may bring an action for dissolution, and the court may award him a money judgment for his share of the premium; but such money judgment results only from the exercise of equitable jurisdiction in determining whether there should be a dissolution. The premium should, in such case, be apportioned on the basis of the actual, and of the agreed, duration of the term, the senior partner to retain *pro tanto* for the time elapsed, the junior partner to be repaid the balance.<sup>2</sup> While the dissolution of the firm does not, of itself, terminate contracts of employment between the firm and clients thereof,<sup>3</sup> it seems that, in such case, the client has the option of abrogating the contract, settling for the services rendered, and employing other counsel, or one of the former partners;<sup>4</sup> but if he fails to take advantage of such option, and permits a former member of the firm to complete the contract, he will be liable for the full amount of compensation originally agreed upon.<sup>5</sup> On dissolution the former partners, or those of them who survive and the representatives of the others, may, and usually do, adjust all partnership business amicably. Should there be a disagreement, however, an action for an accounting will lie as in other partnership cases.<sup>6</sup> Matter relating to compensation as between partners, on

<sup>1</sup> May dissolve by agreement. *Robbins v. Steele*, (Ia.) 135 N. W. 411. And see the cases cited throughout this section.

<sup>2</sup> *Hoyt v. Easton*, 40 Misc. 264, 81 N. Y. S. 914.

<sup>3</sup> See *supra*, § 184.

<sup>4</sup> *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821; *Schneible v. Travelers' Ins. Co.*, 36 Misc. 522, 73 N. Y. S. 955.

See also *supra*, § 140.

<sup>5</sup> *Clifton v. Clark*, 83 Miss. 446, 1

Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821; *Bessie v. Northern Pac. R. Co.*, 14 N. D. 614, 105 N. W. 936.

<sup>6</sup> A lawyer who voluntarily abandons a partnership and becomes a judge, is not chargeable with any of the expenses of his partner, after the dissolution, in prosecuting cases commenced before the partnership was dissolved; and money afterwards collected by him or paid to him by his former partner as his share of the fees earned after the dissolution of

the dissolution of the firm, has been considered elsewhere.<sup>7</sup>

### *Attorneys as Witnesses.*

§ 186. **General Rule.**—An attorney or counselor at law is not, as a general rule, disqualified as a witness;<sup>8</sup> and where there is no violation of the rule as to privileged communications, which has been considered in the preceding chapter,<sup>9</sup> counsel may be called and compelled to testify as to any matter, within their knowledge, which is relevant to the issue.<sup>10</sup> Even a prosecuting attorney

the partnership, in cases commenced before the dissolution, cannot be recovered by the partner in an action for an accounting. *Isenhardt v. Hazen*, 10 Kan. App. 577 mem., 63 Pac. 451.

<sup>7</sup> See *infra*, § 472.

<sup>8</sup> *Rowland v. Plummer*, 50 Ala. 182; *Harless v. Harless*, 144 Ind. 196, 41 N. E. 592; *Shanghnessy v. Fogg*, 15 La. Ann. 330; *In re Normand's Estate*, 88 Neb. 767, 130 N. W. 571; *State v. Challis*, 75 N. H. 492, 70 Atl. 643; *Hardenburgh v. Fish*, 61 App. Div. 333, 70 N. Y. S. 415; *Graham v. Chapman, etc., Works*, 145 App. Div. 62, 129 N. Y. S. 323; *Atlantic, etc., R. Co. v. Atlantic, etc., Co.*, 147 N. C. 368, 15 Ann. Cas. 363, 61 S. E. 185, 125 Am. St. Rep. 550, 23 L.R.A.(N.S.) 223; *Sargent v. Johns*, 206 Pa. St. 386, 55 Atl. 1051.

<sup>9</sup> See *supra*, §§ 92-132.

<sup>10</sup> *United States*.—*French v. Hall*, 119 U. S. 152, 7 S. Ct. 170, 30 U. S. (L. ed.) 375; *Baldwin v. National Hedge, etc., Co.*, 73 Fed. 574, 39 U. S. App. 162, 19 C. C. A. 575. And see *Patton v. Taylor*, 7 How. 132, 12 U. S. (L. ed.) 637.

*Alabama*.—*Sowell v. Brewton Bank*,

119 Ala. 92, 24 So. 585.

*California*.—*People v. Hamberg*, 84 Cal. 468, 24 Pac. 298.

*Colorado*.—*Sholine v. Harris*, 22 Colo. App. 63, 123 Pac. 330.

*Connecticut*.—*Smith v. Huntington*, 1 Root 226; *Kaesar v. Bloomer*, 85 Conn. 209, Ann. Cas. 1913B 710, 82 Atl. 112. And see *Carrington v. Holabird*, 17 Conn. 530.

*Illinois*.—*Stratton v. Henderson*, 26 Ill. 69; *Morgan v. Roberts*, 38 Ill. 65; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *O'Donoghue v. Title Guarantee, etc., Co.*, 79 Ill. App. 263.

*Indiana*.—*Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763.

*Iowa*.—*Walsh v. Murphy*, 2 G. Greene 227; *Abbott v. Striblen*, 6 Ia. 191.

*Kentucky*.—*Hall v. Renfro*, 3 Met. 51; *Roseberry v. Wilson*, 68 S. W. 417.

*Louisiana*.—*Menendez v. Larienda*, 3 Mart. 256; *Caulker v. Banks*, 3 Mart. N. S. 532; *Blanc v. Forgay*, 5 La. Ann. 695.

*Maryland*.—*Beatty v. Davis*, 9 Gill 211; *Forbes v. Perrie*, 1 Har. & J. 109.

may be so called.<sup>1</sup> And the fact that the attorney is a party and is trying his own case does not affect the rule.<sup>2</sup> In the earlier cases it appears that attorneys were frequently held to be incompetent, as witnesses, because of being interested in the subject-matter of the litigation,<sup>3</sup> especially where they had an immediate, direct, and legal interest therein.<sup>4</sup> At the present day, however, disquali-

*Massachusetts*.—Potter v. Ware, 1 Cush. 519.

*Missouri*.—State v. Shour, 196 Mo. 202, 95 S. W. 405.

*New Jersey*.—Folly v. Smith, 12 N. J. L. 139.

*New Mexico*.—Beall v. Territory, 1 N. M. 507.

*New York*.—Gaul v. Groat, 1 Cow. 113; Tullock v. Cunningham, 1 Cow. 256; Pixley v. Butts, 2 Cow. 421; Robinson v. Dauchy, 3 Barb. 20; Sherman v. Scott, 27 Hun 331. See also Little v. Keon, 1 N. Y. Code Rep. 4.

*North Carolina*.—Slocum v. Newby, 5 N. C. 423; State v. Woodside, 31 N. C. 496.

*Ohio*.—Cox v. Hill, 3 Ohio 412.

*Pennsylvania*.—Frear v. Drinker, 8 Pa. St. 520; Bell v. Bell, 12 Pa. St. 235; Johns v. Bolton, 12 Pa. St. 339; Linton v. Com., 46 Pa. St. 294; Follansbee v. Walker, 72 Pa. St. 228, 13 Am. Rep. 671; Perry v. Dicken, 105 Pa. St. 83, 51 Am. Rep. 181.

*South Dakota*.—Alexander v. Ramsom, 16 S. D. 302, 92 N. W. 418.

*Texas*.—Mealer v. State, 32 Tex. Crim. 102, 22 S. W. 142.

*Utah*.—McLaren v. Gillispie, 19 Utah 137, 56 Pac. 680.

*Vermont*.—Holton v. Brown, 18 Vt. 224, 46 Am. Dec. 148.

*Virginia*.—Rea v. Trotter, 26 Gratt. 585.

*Wisconsin*.—Connolly v. Straw, 53 Wis. 649, 11 N. W. 17; Tucker v.

Finch, 66 Wis. 17, 27 N. W. 817. And see the cases cited in note.

<sup>1</sup> People v. Hamburg, 84 Cal. 468, 24 Pac. 298; State v. Wilmbusee, 8 Idaho 608, 70 Pac. 849. See also *supra*, § 104.

<sup>2</sup> Thresher v. Stonington Sav. Bank, 68 Conn. 201, 36 Atl. 38; Kaeser v. Bloomer, 85 Conn. 209, Ann. Cas. 1913B 710, 82 Atl. 112.

<sup>3</sup> Com. v. Moore, 5 J. J. Marsh. (Ky.) 655; English v. Latham, 3 Mart. N. S. (La.) 88; Hall v. Acklen, 9 La. Ann. 219; Chadwick v. Upton, 3 Pick. (Mass.) 442; Meserve v. Hicks, 24 N. H. 295; Jones v. Savage, 6 Wend. (N. Y.) 658; Dowell v. Dowell, 3 Head (Tenn.) 502; Dailey v. Monday, 32 Tex. 141.

<sup>4</sup> Alabama.—McGehee v. Hansell, 13 Ala. 17; Morrow v. Parkman, 14 Ala. 769; Quarles v. Waldron, 20 Ala. 217.

Kentucky.—Southard v. Cushing, 11 B. Mon. 344.

Louisiana.—Grant's Succession, 14 La. Ann. 807.

Maine.—McLaine v. Bachelor, 8 Me. 324; Steward v. Riggs, 10 Me. 467.

Massachusetts.—Phillips v. Bridge, 11 Mass. 242.

Mississippi.—Arthur v. Mitchell, 10 Smed. & M. 326; Dunlap v. Edwards, 29 Miss. 41.

New York.—Brandigee v. Hale, 13 Johns. 125; Caniff v. Myers, 15 Johns. 246; Little v. McKeon, 1 Sandf. 607; Chaffee v. Thomas, 7 Cow. 358.



fication on the ground of interest has been abolished in practically every jurisdiction, even in criminal cases, as to the parties themselves; and where this objection would not be available as to the litigant, it would not, of course, be effective as to his attorney.<sup>5</sup> The only objections which could be made to such evidence now would go to its weight, and not to its competency.<sup>6</sup>

**§ 187. Rule in Delaware.**—In Delaware an attorney cannot testify, as a witness for his client, to any fact which came to his knowledge during that connection,<sup>7</sup> although he has since, by leave of court, withdrawn from the suit.<sup>8</sup> The rule is based on the

*Pennsylvania.*—*Orphans' Ct. v. Woodburn*, 7 W. & S. 162; *McLaughlin v. Shields*, 12 Pa. St. 283; *Edwards v. Goldsmith*, 16 Pa. St. 43; *Braine v. Spalding*, 52 Pa. St. 247.

*South Carolina.*—*Reid v. Colcock*, 1 Nott & M. 592, 9 Am. Dec. 729; *Price v. Moses*, 10 Rich. L. 454. See also *Simonton v. Yongue*, 3 Strobb. L. 538.

*Tennessee.*—*Benton v. Henry*, 2 Coldw. 83.

*Vermont.*—*Phelps v. Hall*, 2 Tyler 309; *Catlin v. Allen*, 17 Vt. 158.

In *Sprigg v. Beaman*, 6 La. 59, the court held that an attorney was not a competent witness on the ground of interest where the attorney testified that he had not stipulated for his fees, but that it was his custom to charge less if the case was unsuccessful. See also *Reeves v. Burton*, 6 Mart. N. S. (La.) 283.

The following cases hold that even where the attorney's fee depends upon the recovery in the action he is a competent witness. *Jackson v. Bennett*, 98 Ga. 106, 26 S. E. 53; *Mott v. Bernard*, 97 Mo. App. 265, 70 S. W. 1093; *Newman v. Bradley*, 1 Dall. (Pa.) 240, 1 U. S. (L. ed.) 118;

*Miles v. O'Hara*, 1 S. & R. (Pa.) 32; *Boulden v. Hebel*, 17 S. & R. (Pa.) 312.

In *Central Branch Union Pac. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276, the court, in holding that an attorney was competent to testify when his compensation was contingent upon the success of the trial, said: "The interest he may have in the result goes to his credibility, but does not affect his competency."

In *England*, it was once considered ground for a new trial that the attorney for the successful party testified in his behalf. *Dunn v. Packwood*, 11 Jur. 242. See also *Stones v. Bacon*, 11 Jur. 44, 1 Saund. & C. 248. Those cases have been disapproved, however, in *Cobbett v. Hudson*, 1 El. & Bl. 11, 72 E. C. L. 11.

<sup>5</sup> *Wigmore on Evidence*, § 1911 (1).

<sup>6</sup> *Willis v. West*, 60 Ga. 613; *Glanz v. Ziabek*, 233 Ill. 22, 84 N. E. 36; *Beatty v. Davis*, 9 Gill (Md.) 211; *Thon v. Rochester R. Co.*, 83 Hun 443, 30 N. Y. S. 620.

<sup>7</sup> *Andrews v. Thompson*, 1 Houst. (Del.) 522.

<sup>8</sup> *Andrews v. Thompson*, 1 Houst. (Del.) 522.

ground of public policy.<sup>9</sup> So, too, the disqualification has been held to extend to associate counsel,<sup>10</sup> and to a student who assisted his preceptor in the preparation of a case for trial.<sup>11</sup> But as to information acquired by the attorney independently of the relation of attorney and client, the rule seems to be relaxed; thus it has been held that the counsel of a complainant may prove service of a notice on the defendant,<sup>12</sup> and that the counsel of one of the litigants may give evidence of an admission made by the adverse party.<sup>13</sup>

§ 188. Rule in Georgia. — The competency of an attorney as a witness in Georgia is regulated by statute. The enactment now in force provides: "No attorney shall be competent or compellable to testify in any court in this State, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner."<sup>14</sup>

<sup>9</sup> *Wallace v. Wilmington & N. R. Co.*, 8 *Houst. (Del.)* 529, 18 *Atl.* 818.

<sup>10</sup> *Pritchard v. Henderson*, 3 *Penn. (Del.)* 128, 50 *Atl.* 217; *Wallace v. Wilmington & N. R. Co.*, 8 *Houst. (Del.)* 529, 18 *Atl.* 818.

<sup>11</sup> *Wallace v. Wilmington & N. R. Co.*, 8 *Houst. (Del.)* 529, 18 *Atl.* 818.

<sup>12</sup> *Real Estate Trust Co. v. Wilmington, etc., Electric R. Co.*, (*Del.*) 77 *Atl.* 756.

<sup>13</sup> *Real Estate Trust Co. v. Wilmington, etc., Electric R. Co.*, (*Del.*) 77 *Atl.* 756.

<sup>14</sup> Sec. 5860 *Ga. Code of 1910*: See also *Willis v. West*, 60 *Ga.* 613; *Philadelphia Fire Assoc. v. Fleming*, 78 *Ga.* 733, 3 *S. E.* 420; *Skellie v. James*, 81 *Ga.* 419, 8 *S. E.* 607; *Jackson v. Bennett*, 98 *Ga.* 106, 23 *S. E.* 53; *O'Brien v. Spalding*, 102 *Ga.* 490, 31

*S. E.* 100, 66 *Am. St. Rep.* 202; *Stone v. Minter*, 111 *Ga.* 45, 36 *S. E.* 321, 50 *L.R.A.* 356; *Smith v. Wilkins*, 113 *Ga.* 140, 38 *S. E.* 406; *Harkless v. Smith*, 115 *Ga.* 350, 41 *S. E.* 634.

The act of 1850 provided that it should not be lawful for an attorney to give testimony of any matter or thing, either for or against his client, the knowledge of which he may have acquired from his client, or during the existence and by reason of the relationship of client and attorney. *Riley v. Johnston*, 13 *Ga.* 260; *Watkins v. Smith*, 17 *Ga.* 68; *McDougald v. Lane*, 18 *Ga.* 444; *Causey v. Wiley*, 27 *Ga.* 444; *Osborn v. Herron*, 28 *Ga.* 313; *Sharman v. Morton*, 31 *Ga.* 34. See also *Swift v. Perry*, 13 *Ga.* 138; *Collins v. Johnson*, 16 *Ga.* 458; *Churchill v. Corker*, 25 *Ga.* 479.

§ 189. **When Called by Adverse Party.** — The impropriety which is recognized in the conduct of an attorney who volunteers to aid the cause of his client as a witness in his behalf is one which attaches to himself, and is not present when he is requisitioned by his adversary.<sup>15</sup> A due recognition, however, of the status of an attorney, representing his client in the trial of a cause, demands that he should not be required by adverse counsel to take the witness stand unless there is a reasonable necessity for such action.<sup>16</sup>

§ 190. **Necessity of Withdrawing from Cause.** — As a mere matter of propriety, an attorney should not testify on behalf of his client, in a case wherein he appears as counsel. The practice, or habit, of doing so deserves, and has received, severe condemnation.<sup>17</sup> It is recognized, of course, that there are instances where counsel cannot avoid testifying on behalf of the client, as where facts are so peculiarly within his knowledge, that his evidence becomes a matter of necessity in order that justice may be done.<sup>18</sup>

<sup>15</sup> *England.*—*Bevan v. Waters*, M. & M. 235, 22 E. C. L. 301; *Levy v. Pope*, M. & M. 410, 22 E. C. L. 343. *Arkansas.*—*Milan v. State*, 24 Ark. 346.

*Connecticut.*—*Loomis v. Norman Printers' Supply Co.*, 81 Conn. 343, 71 Atl. 358.

*Florida.*—*Buckmaster v. Kelley*, 15 Fla. 180.

*Indiana.*—*Oliver v. Pate*, 43 Ind. 132; *Lloyd v. Davis*, 2 Ind. App. 170, 28 N. E. 232; *Model Clothing House v. Hirsch*, 42 Ind. App. 270, 85 N. E. 719.

*Kansas.*—*State v. Tabor*, 63 Kan. 542, 66 Pac. 237, 55 L.R.A. 231.

*Kentucky.*—*Bischoff v. Com.*, 123 Ky. 340, 96 S. W. 538.

*Louisiana.*—*Cox v. Williams*, 5 Mart. N. S. 139; *State v. Cook*, 23 La. Ann. 347.

*Missouri.*—*State v. Hedgepeth*, 125 Mo. 14, 28 S. W. 160.

*Pennsylvania.*—*Livers v. Van Buskirk*, 4 Pa. St. 309.

*Tennessee.*—*Rundle v. Foster*, 3 Tenn. Ch. 658.

<sup>16</sup> *Loomis v. Norman, etc., Co.*, 81 Conn. 343, 71 Atl. 358.

<sup>17</sup> *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816; *Frear v. Drinker*, 8 Pa. St. 521.

<sup>18</sup> *Onstott v. Edel*, 232 Ill. 201, 13 Ann. Cas. 28, 83 N. E. 806; *Wicks v. Wheeler*, 139 Ill. App. 412, 415, 416; *Reavely v. Harris*, 145 Ill. App. 545, affirmed 239 Ill. 526, 88 N. E. 238; *Kintz v. R. J. Menz Lumber Co.*, 47 Ind. App. 475, 94 N. E. 802; *In re Normand's Estate*, 88 Neb. 767, 130 N. W. 571; *McLaren v. Gillispie*, 19 Utah 137, 56 Pac. 680; *Connolly v. Straw*, 53 Wis. 649, 11 N. W. 17.

In such cases, however, the only honorable course for an attorney to pursue is to withdraw from the cause, as counsel,<sup>19</sup> as soon as

<sup>19</sup> *Connecticut*.—*Kaesser v. Bloomer*, 85 Conn. 209, Ann. Cas. 1913B 710, 82 Atl. 112.

*Illinois*.—*Morgan v. Roberts*, 38 Ill. 65; *Ross v. Demoss*, 45 Ill. 447; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816; *Onstott v. Edel*, 232 Ill. 201, 13 Ann. Cas. 28, 82 N. E. 806; *Glanz v. Ziabek*, 233 Ill. 22, 84 N. E. 36; *O'Donoghue v. Title Guarantee, etc., Co.*, 79 Ill. App. 263; *Wicks v. Wheeler*, 139 Ill. App. 412.

*Iowa*.—*Walsh v. Murphy*, 2 G. Greene 227.

*Louisiana*.—*Blanc v. Forgay*, 5 La. Ann. 695.

*Nebraska*.—*Wilson v. Wilson*, 89 Neb. 749, 132 N. W. 401.

*Pennsylvania*.—*Bell v. Bell*, 12 Pa. St. 235; *McLaughlin v. Shields*, 12 Pa. St. 283; *Follansbee v. Walker*, 72 Pa. St. 228, 13 Am. Rep. 671; *Perry v. Dicken*, 105 Pa. St. 83, 51 Am. Rep. 181.

*South Carolina*.—*Price v. Moses*, 10 Rich. L. 454.

*Texas*.—*Yardley v. State*, 50 Tex. Crim. 644, 100 S. W. 399, 123 Am. St. Rep. 869.

*Utah*.—*McLaren v. Gillispie*, 19 Utah 137, 56 Pac. 680.

In *Harkins's Succession*, 2 La. Ann. 923, the court said: "We take this occasion to observe, as an imperative act of judicial duty, that although an attorney at law is under our laws a competent witness for his client, yet the position of an attorney thus offering himself as a witness is one of extreme delicacy to the witness and

to the court; and that it is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not be a witness, except in extreme cases, when all other means of proof are impossible; and then, as it seems to us, the attorney should withdraw from professional participation in the cause. So far as the bench is concerned, it is a duty of the most painful nature to be called upon, as we sometimes have been, to weigh the evidence of a member of the bar."

In *Potter v. Ware*, 1 Cush. (Mass.) 519, the court said: "In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit."

In *Ross v. Demoss*, 45 Ill. 447, 449, the court said: "It is of doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the case; and an attorney occupying the attitude of both witness and attorney for his client, subjects his testimony to criticism if not suspicion. . . . While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."

In *Connolly v. Straw*, 53 Wis. 649,

it becomes evident to him that his testimony will be required on the trial.<sup>20</sup> A fortiori it is improper for an attorney to accept a retainer as additional counsel in a case for a party who will probably call him as a witness.<sup>1</sup> But this rule does not affect the competency of the attorney to testify;<sup>2</sup> nor, apparently, is there any rule of law which actually compels him to withdraw,<sup>3</sup> or which makes his failure to do so reversible error.<sup>4</sup> The fact that a witness is also counsel in the case affects only his credibility.<sup>5</sup> A rule of court forbidding an attorney who has given testimony from arguing the case to the jury is not, however, unreasonable.<sup>6</sup>

**§ 191. Proof of Foreign Laws by Attorney.**—It is a well-established rule that the testimony of a lawyer of another state or country is admissible to prove the unwritten or common law of that state or country.<sup>7</sup> But he will not be allowed to apply the law to

11 N. W. 17, the court said: "As a general rule, no doubt, attorneys should not be witnesses for their clients. The sentiment of the profession is opposed to it, and for very satisfactory reasons; yet cases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. . . . Of course, an attorney should not accept a retainer if he knows in advance that he will be a material witness for the party seeking to employ him. But a breach of professional ethics in this respect does not necessarily involve moral turpitude or affect the credibility of the attorney who thus becomes a witness for his client."

<sup>20</sup> *Onstott v. Edel*, 232 Ill. 201, 208, 209, 13 Ann. Cas. 28, 83 N. E. 806.

<sup>1</sup> *Flood v. Bollmeier*, (Iowa) 138 N. W. 1102.

<sup>2</sup> *Payne v. Miller*, 103 Ill. 442; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Reavely v. Harris*, 239 Ill.

526, 88 N. E. 238; *Bartoletti v. Hoerner*, 154 Ill. App. 336.

<sup>3</sup> *Glanz v. Ziabek*, 233 Ill. 22, 84 N. E. 36.

<sup>4</sup> *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816.

<sup>5</sup> *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *People v. White*, 251 Ill. 67, 95 N. E. 1036; *Domm v. Holtenbeck*, 142 Ill. App. 439.

In such case as in all other cases, the jury may consider the relations of the witness to the parties in determining the weight which should be given to the testimony. The court may properly so instruct the jury in any case, but the jury should not be instructed that the fact that an attorney testifies as a witness for his client necessarily impairs the credibility of the witness. *Connolly v. Straw*, 53 Wis. 649, 11 N. W. 17.

<sup>6</sup> *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L.R.A. 294.

<sup>7</sup> *United States*.—*Pierce v. Indseth*,

the facts in controversy.<sup>3</sup> The witness must, as a general rule, be an attorney or counselor at law of the state or country concerning

106 U. S. 546, 1 S. Ct. 418, 27 U. S. (L. ed.) 254; *U. S. v. Gardiner*, 2 Hayw. & H. (D. C.) 89, 25 Fed. Cas. No. 15,186a.

*Alabama*.—*Inge v. Murphy*, 10 Ala. 885.

*Arkansas*.—*Union Cent. L. Ins. Co. v. Caldwell*, 68 Ark. 505, 58 S. W. 355.

*Iowa*.—*Greason v. Davis*, 9 Ia. 219.

*Kansas*.—*Brenner v. Luth*, 28 Kan. 581. See also *Palmer v. Hudson River State Hospital*, 10 Kan. App. 98, 61 Pac. 506.

*Kentucky*.—*Tyler v. Trabue*, 8 B. Mon. 306; *Pittsburg, etc., R. Co. v. Austin*, 141 Ky. 722, 133 S. W. 780.

*Louisiana*.—See *Taylor v. Swett*, 3 La. 33, 22 Am. Dec. 156.

*Maryland*.—*Wilson v. Carson*, 12 Md. 54; *Baltimore, etc., R. Co. v. Gleen*, 28 Md. 323; 92 Am. Dec. 688; *Dimpfel v. Wilson*, 107 Md. 329, 15 Ann. Cas. 753, 68 Atl. 561, 13 L.R.A. (N.S.) 1180.

*Massachusetts*.—*McRae v. Mattoon*, 13 Pick. 53.

*Michigan*.—*Kermott v. Ayer*, 11 Mich. 181; *Patterson v. Kennedy*, 122 Mich. 343, 81 N. W. 91, 6 Detroit Leg. N. 767.

*Missouri*.—See *Robertson v. Staed*, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L.R.A. 203.

*Nebraska*.—*Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594.

*Oklahoma*.—*Atchison, etc., R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 428.

*Pennsylvania*.—*Dougherty v. Snyder*, 15 S. & R. 84, 16 Am. Dec. 520.

*Virginia*.—See *Norfolk, etc., R. Co. v. Denny*, 106 Va. 383, 56 S. E. 321.

Such testimony is admissible although there is a decision of the other jurisdiction upon the point in question. *McRae v. Mattoon*, 13 Pick. (Mass.) 53.

A lawyer of another state who has deposed that he is familiar with the law is competent to give evidence as to the requisites of a valid marriage in that state. *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L.R.A. 773.

<sup>3</sup> *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886, wherein it was said: "Where experts have proved, as a fact, the law of a sister state as bearing on a contract in issue, it is for the court to apply that law to the contract and to determine the effect of the contract on the rights of the parties."

In *Hite v. Keene*, 149 Wis. 207, Ann. Cas. 1913D 251, 134 N. W. 383, 135 N. W. 354, where Swiss lawyers were sworn as experts, who after reading letters written in English, testified in answer to a general hypothetical question that the letters contained no statement of a precise fact within the meaning of Swiss Pen. Code, § 303, it was held that, assuming that the witnesses understood the English language, the question called for an answer of the same kind as if the hypothetical question had embodied the facts stated in the letters, and hence that the evidence was competent.

whose laws he is called to testify;<sup>9</sup> thus it has been held that a witness is not competent to testify as to the law of a foreign country simply because he has studied it at a university in that country,<sup>10</sup> or because he was a student of history therein.<sup>11</sup> In some instances, however, the evidence of local lawyers has been received

<sup>9</sup> The testimony of an English lawyer who argues appeals from Canada before the Privy Council is not admissible as expert evidence of the validity of a Canadian marriage according to the law of Canada. *Cartwright v. Cartwright*, 26 W. R. (Eng.) 684.

In a case in Maryland wherein the question arose whether a receiver appointed in New York had complied with the requirements of a statute of that state as to notice before conducting a sale of the property in his charge, the court said: "The evidence of the witness Lee, on this point, who swears that the sale was made 'after due public notice and advertisement as required by the laws of the state of New York,' settles the question, provided he is shown to be sufficiently an expert to give such testimony. He states that he is thirty-four years of age, and resides in New York city, and is by occupation a lawyer. This we regard as sufficient to enable him to testify as he has done. The objection that he is not shown to be a lawyer practicing in New York, or informed of the law of that state, but merely that he is a lawyer and resides in New York, and, for aught that appears, may have practiced in another state only, is too refined to be tenable. The fact that he resides in New York, and is a lawyer by profession, authorizes, in the absence of opposing proof, the inference that he practices his pro-

fession in the state or city of his residence, and this makes him competent to testify respecting the matter about which he was examined." *Consolidated Real Estate, etc., Co. v. Cashow*, 41 Md. 59.

A practicing attorney, graduated from the law department of a German university, and who practiced and acted as judge in the German courts for a number of years, during which time he had occasion to take up and decide cases involving the admiralty law, held competent to testify as an expert as to the maritime law of Germany upon a question to which he had given special study. *Manchester Liners v. Virginia-Carolina Chemical Co.*, 194 Fed. 463.

<sup>10</sup> *Bristow v. Sequeville*, 5 Exch. (Eng.) 275, 19 L. J. Exch. 289, 14 Jur. 674, 3 C. & K. 64, followed in *In Goods of Bonelli*, 1 P. D. (Eng.) 69, 34 L. T. N. S. 32, 45 L. J. P. 42, 24 W. R. 255, wherein it appeared that the witness had studied the foreign law in England.

<sup>11</sup> *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Ia. 576, 100 N. W. 532, 104 Am. St. Rep. 367.

*Compare Goods of Whitelegg*, [1899] P. (Eng.) 267, 68 L. J. P. 97, 81 L. T. N. S. 234, wherein it appears that the testimony of a notary public, who had had extensive practice as a notary for many years in Chili, was received to prove the state and effect of the law of that country.

in proof of a foreign law, where it appears that they have a sufficient knowledge thereof so to testify.<sup>12</sup> So also the testimony of the lawyer of another country is admissible upon the construction and effect of, and practice under, a statute of that country.<sup>13</sup> But

<sup>12</sup> *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758; *Hall v. Costello*, 48 N. H. 179, 2 Am. Rep. 207; *Temple v. Pasquotank County*, 111 N. C. 36, 15 S. E. 886.

In a case wherein it appeared that an American lawyer had in each of two successive years spent three months in England, and endeavored during such visits to familiarize himself with the laws of England in regard to the registration of contracts of corporations of the kind described in the complaint, had consulted a solicitor in chancery and a barrister on that subject, and had read one or more acts of Parliament containing provisions as to the registration of corporate documents, he was allowed, after submitting to cross-examination as to his qualifications as an expert, further to testify that under the English law it was necessary to register such a contract as the one in question, in the office of the registrar of English corporations in Somerset House in London. On appeal the court said, per Baldwin, J.: "The decision of the trial court that the witness knew enough of the foreign law in controversy to be allowed to testify as to what it was, is sufficiently supported by the testimony upon which it was based." *Barber v. International Co. of Mexico*, 73 Conn. 587, 48 Atl. 758.

<sup>13</sup> *United States*.—*Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 24 S. Ct. 581, 48 U. S. (L. ed.) 900, *affirming* 115 Fed. 593, 53 C. A. 239.

*Alabama*.—*Walker v. Forbes*, 31 Ala. 9.

*Arkansas*.—See *Barkman v. Hopkins*, 11 Ark. 157.

*Connecticut*.—*Dyer v. Smith*, 12 Conn. 384.

*Georgia*.—*Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

*Illinois*.—*McDeed v. McDeed*, 67 Ill. 545. See also *Hoes v. Van Alstyne*, 20 Ill. 202.

*Iowa*.—*Greason v. Davis*, 9 Ia. 219; *Crafts v. Clark*, 38 Ia. 237.

*Kentucky*.—See *Barker v. Brown*, 33 S. W. 833.

*Maryland*.—*Dimpfel v. Wilson*, 107 Md. 329, 15 Ann. Cas. 753, 68 Atl. 561, 13 L.R.A. (N.S.) 1180.

*Massachusetts*.—*Mowry v. Chase*, 100 Mass. 79.

*Michigan*.—*Seventh Day Adventists General Conf. Ass'n. v. Michigan Sanitarium, etc., Ass'n.*, 166 Mich. 504, 132 N. W. 94.

*Nebraska*.—*Snyder v. Critchfield*, 44 Neb. 70, 62 N. W. 306.

*New Hampshire*.—*Hall v. Costello*, 48 N. H. 179, 2 Am. Rep. 207; *Kennard v. Kennard*, 63 N. H. 303. See *Jenne v. Harrisville*, 63 N. H. 405.

*Pennsylvania*.—*Bollinger v. Gallagher*, 163 Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791, 34 W. N. C. 564.

*Rhode Island*.—*Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283.

*Texas*.—*Sierra Madre Constr. Co. v. Brick*, 55 S. W. 521.

The evidence of one learned in the peculiar system of law to be proved is competent as showing what the real rule is as the result, not of one particular statute or decision, but of the



as to the written law itself, the rule is different; in the United States parol evidence is not admissible to prove the terms of a statute, or other written law.<sup>14</sup> In England, however, the contrary

whole course of exposition, interpretation, and adjudication. *Genet v. Delaware, etc., Canal Co.*, 13 Misc. 409, 35 N. Y. S. 147.

In a New Jersey case wherein it was contended that the presumption that the common law on the point in issue prevailed in New York was not overcome by the affidavit of New York counsel annexed to the answer, for the reason that the affidavit attempted to show that the rule in question had been abrogated by statute, whereas the only legal method of proving the existence of a statute of a foreign state was not by the testimony of counsel of that state, but by the production of a duly authenticated copy of the instrument itself, the court said: "While it is entirely true that in the absence of proof to the contrary the courts of New Jersey will presume that the common law prevails in a sister state, I cannot agree to the proposition that the only method of rebutting this presumption is the production of a copy of the statute which abrogates the common-law rule, the existence of which is challenged. . . . In order to know what the law of a foreign state is on a given subject we need something more than the production of the statute, for that only gives the words in which the law is written. The question to be determined is not what the language of the law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication; and this, I take it, can best be ascertained by the testimony of a

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professional witness, whose special knowledge enables him to speak to that fact." *Title Guarantee, etc., Co. v. Trenton Potteries Co.*, 56 N. J. Eq. 441, 38 Atl. 422.

<sup>14</sup> *Hoes v. Van Alstyne*, 20 Ill. 202; *McDeed v. McDeed*, 67 Ill. 545. See also *Kermott v. Ayer*, 11 Mich. 181; *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894; *Watson v. Walker*, 23 N. H. 476; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 394, 3 Am. Dec. 336; *Atchison, etc., R. Co. v. Lambert*, 32 Okla. 665, 123 Pac. 429; *Cole v. School Dist. No. 29*, 32 Okla. 692, 123 Pac. 426; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858. Compare *Brady v. Palmer*, 10 Ohio Cir. Dec. 27, 19 Ohio Cir. Ct. 687; *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283.

Where the evidence of foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone, and evidence of a lawyer of another state or country, as to what, in the opinion of lawyers there, should be the construction of a statute of that state or country is not admissible where the language of the statute is plain, and there is no decision by the courts of that state or country upon the point in controversy. *Molson's Bank v. Boardman*, 47 Hun 135, 14 N. Y. St. Rep. 658, followed in *Geoghegan v. Atlas S. S. Co.*, 16 Daly 229, 10 N. Y. S. 121. To the same effect is *Hennessey v. Farrelly*, 13 Daly (N. Y.) 468.

It has been held that, in the ab-

appears to be established, so that the testimony of a lawyer of another country as to the contents of a statute of that country is admissible.<sup>15</sup> The English rule has been followed in Canada.<sup>16</sup> Where testimony of a foreign lawyer as to the common law of another country is uncontradicted the court may follow it,<sup>17</sup> but it is

sence of proof of any decision of another state upon the construction of a statute thereof, it is the duty of the trial court to construe such statute, and the testimony of a lawyer of that state is not competent as to the consensus of opinion of the bench and bar therein as to the meaning of the section. *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

A lawyer familiar with the statutes and decisions of another state is competent to testify as to whether a chattel mortgage witnessed in a certain way is void under the law of such state, and the fact that he was permitted over objection to state what the statute itself was, even if erroneous (which is not decided), was not materially prejudicial. *Woods County Union Bank v. Shore*, 87 Kan. 140, 123 Pac. 880.

*The patent laws* of the United States are not the laws of a foreign country to be proved in state courts by the testimony of experts. *Owen v. National Hatchet Co.*, 147 Ia. 393, 121 N. W. 1076, 126 N. W. 333.

*The opinions of attorney-generals* of the United States respecting the construction of acts of Congress are not admissible in an action in a state court. *Shirley v. Walker*, 31 Me. 541.

<sup>15</sup> *Nelson v. Bridport*, 8 Beav. (Eng.) 527, 10 Jur. 871; *Cocks v. Purday*, 2 C. & K. 269, 61 E. C. L.

269; *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208, 10 Jur. 217.

<sup>16</sup> *Arnold v. Higgins*, 11 U. C. Q. B. 446.

<sup>17</sup> *Badische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. 543; *Milwaukee, etc., R. Co. v. Smith*, 74 Ill. 197. See also *Baltimore, etc., R. Co. v. Glenn*, 28 Md. 323, 92 Am. Dec. 688.

Thus, in *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325, the court said: "There was abundant opportunity to take the testimony of some other lawyer, . . . if the statements of claimant's witness were inaccurate; . . . but libellant has contented himself with printing copious excerpts from the statute law of Brazil, which he insists do not sustain the witness' statements. . . . Such a method of criticising the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive. There is much more than the text of a statutory enactment to be considered. Departmental regulations, administrative construction, judicial exposition, are often quite as important. The text of the Act of Congress of February 26, 1885, c. 164, 23 Stat. 332 (3 Fed. St. Ann. 298; U. S. Comp. St. 1901, p. 1290), might well convey to a jurist in some foreign country a different meaning from that which it conveys to a lawyer here who is familiar with Holy Trinity Church v. U. S., 143 U. S. 457, 12 S. Ct. 511, 36 U. S. (L. ed.) 226."

not bound to do so.<sup>18</sup> Thus it has been held that where the evidence refers to a statute, or other written law, the court may examine it, and determine for itself the proper construction thereof.<sup>19</sup> And where the expert evidence as to the foreign law is unsatisfactory and conflicting, the court will itself review the decided cases and text authorities;<sup>20</sup> or, treating the case as if no evidence of

Evidence of a Scotch advocate upon the validity of a bequest, where the facts were stated in the case submitted to him, was held conclusive in *Macdonald v. Macdonald*, L. R. 14 Eq. (Eng.) 60, 41 L. J. Ch. 566, 26 L. T. N. S. 685, 20 W. R. 739, where in the court said: "There is evidence as to the Scotch law which I take to be conclusive, because the facts are stated in the case submitted to the Scotch advocate. He gives an express and distinct opinion that the ten thousand pounds is a valid bequest according to the law of Scotland. Nothing remains but to have it paid."

<sup>18</sup> *Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676, 13 S. E. 109.

<sup>19</sup> *Concha v. Murrietta*, 40 Ch. D. (Eng.) 543, 60 L. T. N. S. 798.

"Though a knowledge of foreign law is not to be imputed to the judge, you may impute to him such knowledge of the general art of reasoning as will enable him, with the assistance of the bar, to discover where fallacies are probably concealed, and in what cases he ought to require testimony more or less strict. If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say that there may not be cases in which the judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application

to the case in question, especially if there should be a variance or want of clearness in the testimony." *Nelson v. Bridport*, 8 Beav. (Eng.) 527, 10 Jur. 871.

Thus the assertion of expert witnesses that a certain method or scheme for winding up an English corporation is approved by the English courts will not be regarded as controlling where the court arrives at a contrary opinion from a view of the English statute and decisions upon the subject. *Bank of China, etc., v. Morse*, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L.R.A. 139, *affirming* 44 App. Div. 435, 61 N. Y. S. 268.

<sup>20</sup> *Bremer v. Freeman*, 10 Moo. P. C. (Eng.) 306; *Hunt v. Trusts, etc., Co.*, 10 Ont. L. Rep. 147, *affirmed* 18 Ont. L. Rep. 351; *Pittsburg, etc., R. Co. v. Austin*, 141 Ky. 722, 133 S. W. 780; *Gasaway v. Thomas*, 56 Wash. 77, 20 Ann. Cas. 1337, 105 Pac. 168.

The testimony of a lawyer who has practiced in another state that the common law prevails in that state except as modified by statute, is insufficient to establish the fact that the common-law rule as to marital rights prevails in that state, and too indefinite and uncertain to furnish a rule for the guidance of the court wherein such testimony is given in settling property rights. *Clardy v.*

the foreign law was submitted, conclude that such law is the same as that of the forum.<sup>1</sup>

§ 192. **Evidence of Validity of Title.** — The validity of title to property is not the subject of expert evidence by lawyers or others; nor would such testimony be binding on the court or jury whose province it is to decide such a question on the facts presented.<sup>2</sup> But where all of the facts upon which the opinion is based are before the court, the admission of such evidence would not necessarily be prejudicial.<sup>3</sup>

*Admissions by Attorneys as Evidence.*

§ 193. **General Rule.** — For the purposes of his employment an attorney is the agent of his client;<sup>4</sup> and the admissions of such attorney are, when otherwise relevant, competent evidence against such client.<sup>5</sup> In order to have this effect, however, it is necessary

Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52.

<sup>1</sup> The opinion of a lawyer called to prove the law of fixtures of a foreign country, where he does not testify to any statute or judicial decision on the subject, but merely gives his opinion on the general law, the authorities being conflicting, which opinion is based on facts not in the record, is not controlling, and the appellate court will presume that the foreign law on the subject is the same as the law of the forum. Gasaway v. Thomas, 56 Wash. 77, 20 Ann. Cas. 1337, 105 Pac. 168.

<sup>2</sup> Mead v. Altgeld, 136 Ill. 298, 26 N. E. 388; Buswell v. O. W. Kerr Co., 112 Minn. 388, 21 Ann. Cas. 837, 128 N. W. 459; Moser v. Cochran, 107 N. Y. 35, 13 N. E. 442; Murray v. Ellis, 112 Pa. St. 485, 3 Atl. 845; Brackenridge v. Claridge, 91 Tex. 527, 44 S. W. 819, 43 L.R.A. 593.

<sup>3</sup> Buswell v. O. W. Kerr Co., 112 Minn. 388, 21 Ann. Cas. 837, 128 N. W. 459.

<sup>4</sup> Kirchheimer v. Barrett, 125 Ill. App. 56; Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 395, 42 Am. Rep. 163; Loomis v. New York, etc., R. Co., 159 Mass. 39, 34 N. E. 82.

<sup>5</sup> *United States.*—Turner v. Yates, 16 How. 14, 14 U. S. (L. ed.) 824. *California.*—People v. Garcia, 25 Cal. 531; People v. Robles, 34 Cal. 591.

*Connecticut.*—Mather v. Phelps, 2 Root 150, 1 Am. Dec. 65; State v. Marx, 78 Conn. 18, 60 Atl. 690.

*Indiana.*—Blessing v. Dodds, 53 Ind. 95.

*Massachusetts.*—James v. Boston El. R. Co., 201 Mass. 263, 87 N. E. 474.

*Michigan.*—Kramer v. Gustin, 53 Mich. 291, 19 N. W. 1.

for the admission to be within the scope of the attorney's authority,<sup>6</sup> made during his employment,<sup>7</sup> distinct and formal in character,<sup>8</sup> and made for the purpose of dispensing with certain proof, or with some other legal requirement.<sup>9</sup> In the trial of a cause, the admissions of counsel are constantly received and acted upon; and, as bearing upon the issue involved, such admissions may be the ground of the court's action equally as if the facts admitted were established by the clearest proof.<sup>10</sup> And, in some instances, an admission by an attorney, though not made under circum-

*New Hampshire.*—*Alton v. Gilman-ton*, 2 N. H. 520.

*South Carolina.*—*Lombard v. Hendrix*, 54 S. C. 476, 32 S. E. 511.

*Utah.*—*Burraston v. Nephi First Nat. Bank*, 22 Utah 328, 62 Pac. 425.

*Wisconsin.*—*Knapp v. Runals*, 37 Wis. 135.

<sup>6</sup> See *infra*, § 194.

<sup>7</sup> See *infra*, § 196.

<sup>8</sup> *McRea v. Insurance Bank*, 16 Ala. 755; *Chicago City R. Co. v. McMeen*, 70 Ill. App. 220; *Lake Erie, etc., R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470; *Treadway v. Sioux City, etc., R. Co.*, 40 Ia. 526; *Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468; *Douglass v. Mitchell*, 35 Pa. St. 440; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725.

*Retraction of Admissions.*—Where an attorney has, in the progress of a cause, made admissions against his client's interests under a misapprehension of the facts, he may retract them; but in such a case the retraction will be allowed only upon condition that he disclose the true facts. *Gates v. Brinkley*, 4 Lea (Tenn.) 710.

See *infra*, § 195.

<sup>9</sup> *United States.*—*The Harry*, 9 Ben. 524, 11 Fed. Cas. No. 6,147.

*Connecticut.*—*Abbott v. Lec*, 86 Conn. 392, 85 Atl. 526.

*Indiana.*—*Lake Erie, etc., R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.

*Louisiana.*—*Shipman v. Haynes*, 15 La. 363.

*Massachusetts.*—*Pickert v. Hair*, 146 Mass. 1, 15 N. E. 79.

*Missouri.*—*Nichols v. Jones*, 32 Mo. App. 657.

*Nebraska.*—*Whiteside v. Adams Express Co.*, 89 Neb. 430, 131 N. W. 953.

*Vermont.*—*Underwood v. Hart*, 23 Vt. 120.

Lord Ellenborough, in *Young v. Wright*, 1 Campb. (Eng.) 139, said: "If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission."

<sup>10</sup> *Starke v. Kenan*, 11 Ala. 818; *Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461.

When a district attorney admitted that any number of witnesses, however great, would testify that the reputation of the deceased for peace and quiet was bad, no witnesses to the contrary being offered, it may almost be said as matter of law that

stances that would make it evidence as against his client, is admissible to show that the attorney had knowledge of the fact admitted,<sup>11</sup> or for the purpose of rebutting the evidence of such attorney.<sup>12</sup> In Michigan it has been held that a conviction in a criminal case, involving the question of intent, cannot be predicated upon the admissions of counsel.<sup>13</sup> And in Texas, the jury in criminal cases are not authorized to give the slightest weight to any admissions or statements of counsel as to the facts.<sup>14</sup>

**§ 194. Within Scope of Attorney's Authority.**—Admissions made by an attorney, in order to be provable against his client, must be within the scope of the attorney's authority; if so they are admissible; <sup>15</sup> otherwise, of course, they are not.<sup>16</sup> So that, in

his reputation in these particular characteristics was bad. *People v. Shaver*, 120 Cal. 354, 52 Pac. 651.

The language used in an admission will be given its ordinary meaning. *Master Builder's Assoc. v. Domascio*, 16 Colo. App. 25, 63 Pac. 782.

<sup>11</sup> *Beinert v. Tivoli*, 62 Misc. 616, 116 N. Y. S. 4.

<sup>12</sup> *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

<sup>13</sup> *People v. Hall*, 86 Mich. 132, 48 N. W. 869.

<sup>14</sup> *Nels v. State*, 2 Tex. 280; *Clayton v. State*, 4 Tex. App. 515; *Sanderson v. State*, (Tex.) 44 S. W. 1103; *Murmurt v. State*, (Tex.) 63 S. W. 634.

<sup>15</sup> *Alabama*.—*McRea v. Insurance Bank*, 16 Ala. 755.

*California*.—*Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473.

*Connecticut*.—*McNamara v. Douglas*, 78 Conn. 219, 61 Atl. 368.

*Florida*.—*Thomas Bros. Co. v. Price*, 56 Fla. 854, 48 So. 262.

*Illinois*.—*Wilson v. Spring*, 64 Ill. 14.

*Iowa*.—*Neindorf v. Van de Voorde*,

143 Ia. 318, 120 N. W. 84; *Cox v. Cline*, 147 Ia. 353, 126 N. W. 330.

*Massachusetts*.—*Loomis v. New York, etc., R. Co.*, 159 Mass. 39, 34 N. E. 82; *James v. Boston El. R. Co.*, 201 Mass. 263, 87 N. E. 474.

*Michigan*.—*Ward v. Beecher*, 56 Mich. 616, 23 N. W. 438; *Brown v. Great Camp of Knights of Modern Maccabees*, 167 Mich. 123, 132 N. W. 562.

*Mississippi*.—*Wenans v. Lindsey*, 1 How. 577.

*New York*.—*Stinesville, etc., Stone Co. v. White*, 32 Misc. 135, 65 N. Y. S. 609, reversing 25 Misc. 314, 54 N. Y. S. 577.

*South Carolina*.—*Meinhard v. Youngblood*, 41 S. C. 312, 19 S. E. 675.

<sup>16</sup> *United States*.—*Horseshoe Min. Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213.

*California*.—*Wilson v. Southern Pac. R. Co.*, 53 Cal. 735; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31.

*Connecticut*.—*Rockwell v. Taylor*, 41 Conn. 55.

*Georgia*.—*Cassels v. Urry*, 51 Ga. 621.

this aspect of the situation, the question of authority to make the admission becomes predominant. As a rule, each case must depend on its own facts, and this is especially true where it is claimed that some special authority has been conferred on the attorney by his client. In such case the party offering the evidence would be obliged first to establish the fact that the attorney was authorized to make the declarations on behalf of his client.<sup>17</sup> Thus it has been held that the legal adviser, or general counsel, of a corporation has no authority, by virtue of his general employment, to bind the company by declarations or admissions outside of the business of the law department, unless it is shown that such counsel is vested with special authority concerning such matters.<sup>18</sup> An admission of the defendant's liability by an attorney, to whom the plaintiff was referred by the defendant, is not competent in the absence of proof that the attorney was referred to in such a way as to constitute him an agent of the defendant, with authority to make admissions or promises to the plaintiff.<sup>19</sup> Nor can an admission be predicated on the advice given by an attorney to his client,<sup>20</sup> or upon an expression of an opinion by counsel favorable to his client's opponent.<sup>1</sup>

**§ 195. Formality and Distinctness.**—While an attorney is in one sense his client's agent, still the special work which counsel has to perform is to make the most favorable showing possible upon the facts, as well as law. He is an advocate with unlimited powers of discretion. He is not like an ordinary agent, whose express duties and methods of procedure are laid out beforehand, so that the principal may justly be held liable for what he originates, though its execution be entrusted to another. An advo-

*Massachusetts.* — *Vietor v. Spalding*, 199 Mass. 52, 84 N. E. 1016, 127 Am. St. Rep. 472.

*New York.*—*Lewis v. Duane*, 69 Hun 28, 23 N. Y. S. 433; *Ditmars v. Sackett*, 81 Hun 317, 30 N. Y. S. 721.

<sup>17</sup> *O'Brien v. Weiler*, 68 Hun 64, 22 N. Y. S. 627.

<sup>18</sup> *Ohio, etc., R. Co. v. Levy*, 134 Ind. 343, 32 N. E. 915, 34 N. E. 20.

<sup>19</sup> *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. 13.

<sup>20</sup> *Klein v. East River Electric Light Co.*, 182 N. Y. 27, 74 N. E. 495, reversing 90 App. Div. 92, 86 N. Y. S. 164.

<sup>1</sup> *Farmers' Mut. F. Ins. Co. v. Bowen*, 40 Mich. 147; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 319, 50 S. E. 703.

cate's statements are always supposed to be adapted to the exigencies of the case on trial, and colored by what he conceives his client's best interest demands, at that particular time, and under those peculiar circumstances. Acts and statements that would seem disingenuous, or even culpably misleading in other relations of life, are pardoned in the professional advocate, because of his necessary attitude toward his client, and toward the enemy. There is every reason, therefore, why the oral statements of counsel upon a judicial inquiry of any sort, no matter what their purport may be, should not be taken as solemn admissions of fact which the client may not afterward gainsay.<sup>2</sup> Thus it has been held that remarks made by counsel will not bind, or be admissible against, the client, where there is no such distinctness and formality in the making of the statements as to indicate an intention either that they should be taken to be admissions,<sup>3</sup> or that they should be so understood.<sup>4</sup> Mere incidental, or unguarded expressions of counsel, or ambiguous statements, should not be so strained

<sup>2</sup> *Anderson v. McAleenan*, 15 Daly 444, 8 N. Y. S. 483.

<sup>3</sup> *Connecticut*.—*Rockwell v. Taylor*, 41 Conn. 55.

*Idaho*.—*State v. Shuff*, 9 Idaho 115, 72 Pac. 664.

*Indiana*.—*North v. Jones*, 100 N. E. 84.

*Missouri*.—*Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468; *O'Donnell v. McElroy*, 157 Mo. App. 547, 138 S. W. 674; *Renfrew v. Goodfellow*, 162 Mo. App. 333, 141 S. W. 1153.

*Nebraska*.—*Union Pac. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368.

*New York*.—*Lecour v. Importers' etc., Nat. Bank*, 38 App. Div. 384, 56 N. Y. S. 356; *Adee v. Howe*, 15 Hun 20; *Ryan v. Brown*, 104 N. Y. S. 871.

*North Carolina*.—*Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718; *Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 319, 50 S. E. 703.

*Pennsylvania*.—*Lowrie v. Verner*, 3

Watts 317; *Snyder v. Armstrong*, 6 W. N. C. 412.

*Washington*.—*Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 849; *Dollar v. Northwestern Imp. Co.*, 72 Wash. 1, 129 Pac. 578.

<sup>4</sup> *Adee v. Howe*, 15 Hun (N. Y.) 20.

Where, on offering a lien in evidence, counsel said: "I object to the lien being introduced in evidence because it does not comply with the requirements of section 4207 of the Revised Statutes of 1899 in regard thereto, in this that there is no itemized account of the articles charged for, and that there is no statement of the quality of the articles furnished; nor of the price charged for the materials claimed to have been furnished to the original contractor in this case," it was held that it would not be fair to say that the language, when liberally construed and taken in connection with the object intended,



in meaning as to prejudice the client,<sup>5</sup> even though they are made during the progress of a trial,<sup>6</sup> and in presence of the jury.<sup>7</sup> The doctrine of acquiescence does not apply to proceedings on trials of controversies, because it is not the right or duty of a party to interrupt the order of proceedings in such cases by denials or contradictions, and his silence cannot, therefore, under such circumstances, be deemed an admission.<sup>8</sup> To entitle a remark of counsel to the character of an admission, it must have some degree of deliberation, purpose, and recognition for that end.<sup>9</sup> Admissions which occur in mere conversation, though they relate to matters at issue in the case, cannot be received in evidence against a client.<sup>10</sup>

was an admission that there was an original contractor. *Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468.

<sup>5</sup> *Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461; *Missouri, etc., Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771; *Jose v. Hoyt*, 106 Mo. App. 594, 81 S. W. 468.

<sup>6</sup> *McKeen v. Gammon*, 33 Me. 187.

<sup>7</sup> *State v. Shuff*, 9 Idaho 115, 72 Pac. 664.

<sup>8</sup> *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

"Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial, do not bind the client; they are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly and confusing, if the client should interpose to correct his counsel and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his at-

torney, unless he shall be examined by the opposing party for that purpose." *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718. But see *Tolbert v. State*, (Ga.) 78 S. E. 131.

<sup>9</sup> *Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461; *Adeco v. Howe*, 15 Hun (N. Y.) 20.

<sup>10</sup> *England*.—*Parkins v. Hawkshaw*, 2 Stark. 239, 3 E. C. L. 393; *Wilson v. Turner*, 1 Taunt. 398.

*Georgia*.—*Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787.

*Iowa*.—*Treadway v. Sioux City, etc., R. Co.*, 40 Ia. 526.

*Massachusetts*.—*Saunders v. McCarthy*, 8 Allen 42.

*Mississippi*.—*Wenans v. Lindsey*, 1 How. 577.

*Nebraska*.—*Whiteside v. Adams Express Co.*, 89 Neb. 430, 131 N. W. 953.

*New York*.—*Lecour v. Importers' etc., Nat. Bank*, 38 App. Div. 384, 50 N. Y. S. 356; *Stephens v. Vroman*, 16 N. Y. 381.

*North Carolina*.—*Hicks v. Naomi Falls Mfg. Co.*, 138 N. C. 319, 50 S. E. 703.

*Wisconsin*.—*Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

It has been quite generally held that the opening statements of counsel, as to the facts he expects to prove on the trial, have not the force of a binding admission;<sup>11</sup> but where such statements are formal and distinct, and apparently intended as an admission of fact, it would seem that they might be recognized and proven as such.<sup>12</sup> The "judicial confession" is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding; and it cannot be revoked, unless it is proved to have been made through error of fact.<sup>13</sup>

§ 196. During Employment. — The statements of an attorney cannot, of course, bind one who is not his client,<sup>14</sup> even though subsequently the parties actually entered into the relation of attorney and client.<sup>15</sup> So, also, admissions made by an attorney after his employment has ended, are not binding upon his former client, and are wholly incompetent as evidence against such client.<sup>16</sup> Nor are the declarations of an attorney competent to prove his employment,<sup>17</sup> or to show the scope of his authority.<sup>18</sup> As an attorney's power is not general, but special, and confined to the particular case in which he is employed, his admissions cannot be received outside of that case, unless his client has made the admissions his own by acquiescing in them.<sup>19</sup>

<sup>11</sup> *Russ v. Wabash Western R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L.R.A. 823; *Evans v. Montgomery*, 95 Mich. 497, 55 N. W. 382; *People v. Thompson*, 103 Mich. 80, 61 N. W. 345; *Ferson v. Wilcox*, 19 Minn. 449.

It would be extravagant to allow the summing up of counsel, in whole or in part, to be used as evidence of his client's admissions, because the latter did not interrupt his counsel to correct the supposed error. *Adee v. Howe*, 15 Hun (N. Y.) 20. See also *Moffit v. Witherspoon*, 32 N. C. 185.

<sup>12</sup> *Lindley v. Atchison, etc., R. Co.*, 47 Kan. 432, 28 Pac. 201; *Missouri, etc., Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771.

<sup>13</sup> *Coleman v. Jones*, 131 La. 803, 60 So. 243.

<sup>14</sup> *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. S. 1002; *Donohue v. Watson*, 72 Misc. 56, 128 N. Y. S. 1089; *Moffit v. Witherspoon*, 32 N. C. 185.

<sup>15</sup> *First Nat. Bank v. Anderson*, 28 S. C. 143, 5 S. E. 343.

<sup>16</sup> *Walden v. Bolton*, 55 Mo. 405; *Janeway v. Skerritt*, 30 N. J. L. 97; *Wright v. Daily*, 26 Tex. 730.

<sup>17</sup> *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

<sup>18</sup> *West v. A. F. Messick Grocery Co.*, 138 N. C. 166, 50 S. E. 565.

<sup>19</sup> *Nichols v. Jones*, 32 Mo. App. 657.

§ 197. **Admissions by Attorney's Clerks.**—Where an attorney intrusts the business of his client to a clerk, it has been held that the declarations made by such clerk in connection with the client's affairs, and within the scope of his authority, are competent evidence as against the client.<sup>20</sup> Thus where a clerk had actual charge of the collection of an account, and had drawn papers for attachment proceedings, which were afterwards filed on the attorney's approval, it was held that the clerk's declarations were admissible against the client when sued for wrongful attachment.<sup>1</sup> Clients cannot, in reason, expect that every act in connection with the business affairs intrusted by them to an attorney will be done by him personally. In the very nature of things, much of the detail work must be done by assistants under the supervision of such attorney. To say that for the particular acts done by such an assistant the client is under no responsibility, might lead to the gravest abuses.<sup>2</sup>

§ 198. **Competency of Admission on Subsequent Trial.**—Where an admission is distinctly and formally made by counsel,<sup>3</sup> for the express purpose of relieving the opposing party from some legal requirement, or from the proof of some fact,<sup>4</sup> it may be introduced in evidence upon a subsequent trial of the same action.<sup>5</sup>

<sup>20</sup> *Murray v. Sweasy*, 69 App. Div. 45, 74 N. Y. S. 543.

<sup>1</sup> *Lord v. Wood*, 120 Ia. 303, 94 N. W. 842.

<sup>2</sup> *Lord v. Wood*, 120 Ia. 303, 94 N. W. 842.

<sup>3</sup> See § 195.

<sup>4</sup> See § 193 note.

<sup>5</sup> *England*.—*Landley v. Oxford*, 1 M. & W. 508; *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372, 1 M. & Rob. 196; *Colledge v. Horn*, 3 Bing. 119, 11 E. C. L. 59; *Doe v. Bird*, 7 C. & P. 6, 32 E. C. L. 415; *Van Wart v. Wolley*, R. & M. 4, 21 E. C. L. 366; *Haller v. Worman*, 2 F. & F. 165, 3 L. T. N. S. 741, 9 W. R. 348; *Marshall v. Cliff*, 4 Campb. 133.

*United States*.—*Scaife v. Western*

*North Carolina Land Co.*, 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47.

*Alabama*.—*Ryan v. Beard*, 74 Ala. 306.

*Connecticut*.—*Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313.

*Georgia*.—*Hargroves v. Redd*, 43 Ga. 142.

*Illinois*.—*Kirchheimer v. Barrett*, 125 Ill. App. 56.

*Indiana*.—*Hays v. Hynds*, 28 Ind. 531; *McKinney v. Salem*, 77 Ind. 213.

*Kansas*.—*Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *Missouri*, etc., *Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771.

Admissions of this kind, unless specially restricted, may be availed of at any subsequent period;<sup>6</sup> and can only be withdrawn by leave of court or by consent of the parties.<sup>7</sup> But if from the language used at the time, or the surrounding circumstances, it appears that an admission was intended as a mere waiver of proof for the purposes of the particular trial only, that will be the whole scope of its force; it will not, in such case, be admissible against the client on a subsequent trial of the cause.<sup>8</sup> It is doubtless often true

*Louisiana*.—*Shipman v. Haynes*, 15 La. 363.

*Maine*.—*Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40.

*Maryland*.—*Farmers' Bank v. Sprigg*, 11 Md. 389; *Elwood v. Lannon*, 27 Md. 200.

*New Jersey*.—*Marsh v. Mitchell*, 26 N. J. Eq. 497; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582.

*New York*.—*Owen v. Cawley*, 36 N. Y. 600; *Adee v. Howe*, 15 Hun 20; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun 365, 22 N. Y. S. 348.

*North Carolina*.—*Virginia-Carolina Chemical Co. v. Kirven*, 130 N. C. 161, 41 N. E. 1.

*Ohio*.—*State v. Buchanan*, Wright 233.

*South Carolina*.—*Brown v. Pechman*, 55 S. C. 555, 33 S. E. 732.

<sup>6</sup> *Scaife v. Western North Carolina Land Co.*, 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47; *Moynahan v. Perkins*, 36 Colo. 481, 10 Ann. Cas. 1061, 85 Pac. 1132; *Missouri, etc., Telephone Co. v. Vandevort*, 67 Kan. 269, 72 Pac. 771; *Holderness v. Baker*, 44 N. H. 414.

<sup>7</sup> *Owen v. Cawley*, 36 N. Y. 600.

Admissions contained in a bill of exceptions signed by counsel are admissible in any subsequent proceeding in the action, unless the attorney making them is relieved from their

effect by the court. *Scaife v. Western North Carolina Land Co.*, 90 Fed. 238, 61 U. S. App. 647, 33 C. C. A. 47; *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40; *Virginia-Carolina Chemical Co. v. Kirven*, 130 N. C. 161, 41 N. E. 1.

"Where the parties enter into a formal agreement in writing, stipulating for the admission of certain specified facts, or waiving their right to a particular mode of trial, such agreement is binding upon the parties until the case is finally disposed of, unless such agreement is abrogated by the written consent of both parties, or one of the parties has been relieved from its operation by an order of the court, based upon such a showing as satisfies the court that the interests of justice require that he should be so relieved." *Brown v. Pechman*, 55 S. C. 555, 33 S. E. 732. See also *Farmers Bank v. Sprigg*, 11 Md. 389; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582.

<sup>8</sup> *Ryan v. Beard*, 74 Ala. 306; *Moynahan v. Perkins*, 36 Colo. 481, 10 Ann. Cas. 1061, 85 Pac. 1132; *Kirchheimer v. Barrett*, 125 Ill. App. 56; *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163; *State v. Buchanan*, Wright (Ohio) 233; *Weisbrod v. Chicago, etc., R. Co.*, 20 Wis. 419.

that during the progress of a trial, and to hasten it, counsel waive the production by the opposite party of formal proof of some fact, intending to rest their case on some other matter; and this, which is done for the mere purpose of that trial alone, and for the sake of facilitating it, is not to be considered as such a formal admission of fact, as would be binding in all subsequent progress of the case.<sup>9</sup> Where the scope and intent of an admission is uncertain, the matter must be left to the jury for its determination.<sup>10</sup> So, too, a concession made by counsel in his client's presence, in conducting an argument before the court, in answer to a question of one of the justices as to his contention, is regarded as having been made for the purpose of that hearing, and it cannot be introduced in evidence at a new trial of the case as an admission.<sup>11</sup> Admissions made on one trial are not, of course, competent evidence in another suit or legal proceeding in which different issues are involved.<sup>12</sup> An admission which has been properly withdrawn cannot be introduced in evidence on a subsequent trial of the same action; <sup>13</sup> but, in order to prevent the introduction of the admission in evidence, notice of its withdrawal should be given by counsel,<sup>14</sup> prior to the beginning of the second trial.<sup>15</sup> It has been held that an agreement "to admit on the trial" certain facts, cannot be with-

<sup>9</sup> *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

<sup>10</sup> *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

<sup>11</sup> *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412. And to the same effect see *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402, 3 Am. Dec. 557.

<sup>12</sup> *Miller v. U. S.*, 133 Fed. 337, 60 C. C. A. 399; *Atchison, etc., R. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Harrison v. Baker*, 5 Litt. (Ky.) 250; *Nichols v. Jones*, 32 Mo. App. 657; *Elting v. Scott*, 2 Johns. (N. Y.) 157.

<sup>13</sup> *Hays v. Hynds*, 28 Ind. 531. See also *Colledge v. Horn*, 3 Bing. 119,

<sup>11</sup> E. C. L. 59. Compare *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313; *Shipman v. Haynes*, 15 La. 363.

An admission that a deed "was duly executed and delivered" was held inadmissible, where it appeared that it had been made in ignorance of the facts and that notice of its withdrawal had been given the opposing counsel a reasonable time before the retrial of the case. *Daneri v. Gazzola*, 2 Cal. App. 351, 83 Pac. 455.

<sup>14</sup> *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372, 1 M. & Rob. 196.

<sup>15</sup> A notice of withdrawal is given too late where it is not given until after the beginning of the subsequent trial of the case. *Hargroves v. Redd*, 43 Ga. 142.

drawn.<sup>16</sup> Where the issue between the parties to a suit is the value at a given time of certain land owned by one of them, an affidavit made by the attorney and agent of the owner, filed with the taxing authorities about two years before, stating the value of the property, is admissible against the owner as a declaration by him through his agent against interest.<sup>17</sup>

<sup>16</sup> Where the admission is prefaced by the statement that "we hereby agree to admit on the trial of this cause," etc., a notice of withdrawal will not be available. *Doe v. Bird*, 7 C. & P. 6, 32 E. C. L. 416; as the expression "on the trial" applies to

every trial which may take place by the direction of the court. *Elton v. Larkins*, 5 C. & P. 385, 24 E. C. L. 372, 1 M. & Rob. 196.

<sup>17</sup> *Shoemaker Co. v. Munsey*, 37 App. Cas. (D. C.) 95.

## CHAPTER X.

### SCOPE OF ATTORNEY'S AUTHORITY—DELEGATION OF AUTHORITY— RATIFICATION OF UNAUTHORIZED ACTS.

#### *In General.*

§ 199. General Rule.

- 200. Assent to Assignment for Creditors, and Resistance to Discharge of Bankrupt.
- 201. Executing Bond for Client.
- 202. Making or Altering Contracts.

#### *Disposition of Choses and Other Property—Collection and Receipt of Money.*

- 203. Disposition of Client's Choses or Other Property.
- 204. Receipt of Money for Client Generally.
- 205. On Claims Held for Collection.
- 206. Right to Demand Payment.
- 207. Extending Time of Payment.
- 208. Receipt of Money Outside Scope of Employment.
- 209. Authority to Resort to Criminal Proceedings.

#### *Delegation of Authority.*

- 210. Generally.

#### *Ratification of Unauthorized Acts.*

- 211. Generally.
- 212. Ratification by Adopting or Accepting Benefits of Attorney's Acts.
- 213. Ratification by Failing to Object.
- 214. Laches as Ratification.

#### *In General.*

§ 199. General Rule. — The general rule is that an attorney has implied authority to do anything necessarily incidental to the discharge of the purpose for which he was retained,<sup>1</sup> in or out of

<sup>1</sup> *United States*.—*Bonnifield v.* 28 Ala. 711, 65 Am. Dec. 380; *Robinson v. Murphy*, 69 Ala. 547.

*Alabama*.—*Albertson v. Goldsby*, *California*.—*Alexander v. Dena-*

court.<sup>2</sup> Indeed, it has been said that, within the scope of his employment, there is nothing that counsel may not do in the interest of his client provided the manner of doing it is courteous and respectful.<sup>3</sup> Thus he may inspect public records in which his client is interested,<sup>4</sup> and he may go within the walls of a prison to consult with his client at all reasonable hours of the day, and, if he is denied admittance, summary redress may be had.<sup>5</sup> Where an attorney does what he has authority to do, and more, his act is good to the extent of his authority; and where he stops short of his authority, if the object of the power be accomplished, his act is also good.<sup>6</sup> But the acts of an attorney beyond the scope of his authority do not bind his client.<sup>7</sup> Thus the general employment of

veaux, 53 Cal. 663; *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

*Connecticut*.—*Derwort v. Loomer*, 21 Conn. 255.

*Illinois*.—*Lanum v. Patterson*, 143 Ill. App. 248.

*Louisiana*.—*Curtis v. Union Homestead Assoc.*, 126 La. 959, 53 So. 63.

*Massachusetts*.—*Moulton v. Bowker*, 115 Mass. 40, 15 Am. Rep. 72.

*New York*.—*Gorham v. Gale*, 7 Cow. 744, 17 Am. Dec. 549; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519.

*North Carolina*.—*Asheville Supply, etc., Co. v. Machin*, 150 N. C. 744, 64 S. E. 887.

*Ohio*.—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321.

*South Carolina*.—*Annely v. De Saussure*, 12 S. C. 488.

*South Dakota*.—*Fox v. Deering*, 7 S. D. 443, 64 N. W. 520.

*Tennessee*.—*Dooley v. Dooley*, 9 Lea 306; *Rogers v. Rogers*, 35 S. W. 890.

*Wyoming*.—*W. W. Kimball Co. v. Payne*, 9 Wyo. 441, 64 Pac. 673.

<sup>2</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

<sup>3</sup> *Wright v. State*, 18 Ga. 383.

<sup>4</sup> *Brewer v. Watson*, 61 Ala. 310.

An attorney at law may maintain an action for damages against a state auditor for refusing to allow him to inspect a "tax ledger" that contains entries in which his client is interested. *Brewer v. Watson*, 65 Ala. 88.

But the officer having custody of books, other than judicial records, may require satisfactory evidence of the attorney's authority. *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318.

<sup>5</sup> *Ex p. McClelan*, 1 Wheel. Crim. Cas. (N. Y.) 303.

<sup>6</sup> *Missouri Bank v. McKnight*, 2 Mo. 42.

<sup>7</sup> *United States*.—*Stone v. Bank of Commerce*, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028; *Horse-shoe Min. Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213.

*Illinois*.—*Bell v. Farwell*, 189 Ill. 414, 59 N. E. 955, *affirming* 89 Ill. App. 638.

*Kentucky*.—*Handley v. Stator*, Litt. Sel. Cas. 186.

*Michigan*.—*Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5.

*New Jersey*.—*Mutual L. Ins. Co.*



an attorney in reference to a particular subject, cannot be held to extend to a matter, connected therewith, in which he is personally interested in opposition to the interests of his client.<sup>8</sup> So, an attorney's unlawful conduct cannot affect his client.<sup>9</sup> Nor can an attorney bind his client as to matters collateral to his employment,<sup>10</sup> such as the acknowledgment of a debt.<sup>11</sup> So, an unauthorized agreement by the general attorney of a corporation, that the company should employ a certain person for life, as a partial satisfaction of a claim for damages, is without the scope of his authority.<sup>12</sup> The rules of law applicable to principal and agent control the relation between attorney and client, and persons dealing with the attorney are bound to take notice of the extent of his authority.<sup>13</sup> But secret limitations on the powers of an attorney

*v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184; *Callaway v. Equitable Trust Co.*, 67 N. J. L. 44, 50 Atl. 900.

*North Dakota*.—*McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243.

*Ohio*.—*Critchfield v. Porter*, 3 Ohio 518.

*Texas*.—*Merritt v. Clow*, 2 Tex. 582.

<sup>8</sup> *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5, wherein it was said: "If claims were placed in his hands for collection, with authority to compromise whenever he considered it for his client's benefit so to do, and among such claims was one upon which he was personally liable, would his authority extend to such a case? If employed to sell property he could not become the purchaser; or if to buy, he could not purchase property in which he had an interest; or if money was entrusted to him for loan, he could not become the borrower, unless the client was made fully acquainted with all the facts and consented thereto, or ratified the transaction. In fact, a general employment will not be held to extend to matters where the interests of the Attys. at L. Vol. I.—23.

parties would come in conflict. The law will not permit a general employment to extend to such cases."

<sup>9</sup> *J. M. Robinson & Co. v. Pikeville Bank*, 146 Ky. 538, 142 S. W. 1065, 37 L.R.A.(N.S.) 1186; *Hamel v. Brooklyn Heights R. Co.*, 59 App. Div. 135, 69 N. Y. S. 166. See also *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

<sup>10</sup> *Meriden Hydro-Carbon Arc Light Co. v. Anderson*, 111 Ill. App. 449; *Wonderly v. Martin*, 69 Mo. App. 84.

<sup>11</sup> *Hill v. Barlow*, 6 Rob. (La.) 142; *Thomas v. Wiltbank*, 6 W. N. C. (Pa.) 477.

<sup>12</sup> *Nephew v. Michigan Cent. R. Co.*, 128 Mich. 599, 87 N. W. 753, 8 Detroit Leg. N. 784. See also *Haynes v. Tacoma, etc., R. Co.*, 7 Wash. 211, 34 Pac. 922; *Doran v. Great Western R. Co.*, 14 U. C. Q. B. 403.

<sup>13</sup> *Robinson v. Murphy*, 69 Ala. 548; *Nelson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523.

When one depends on the promise of the attorney of a party to an action, he is bound to know the extent of the attorney's authority, and

are not binding on persons dealing with him in good faith, believing him to possess the usual and ordinary powers of an attorney.<sup>14</sup> The assumption of an attorney at law, even if generally retained, of authority to act for his principal outside of the due conduct of litigation, does not create any presumption of actual authority, but his acts must be shown to be within the scope of his authority in order to bind his principal.<sup>15</sup>

**§ 200. Assent to Assignment for Creditors, and Resistance to Discharge of Bankrupt.** — An attorney at law, having confided to him by creditors a discretionary power to collect a debt, may, in the exercise of his discretion, bind his clients by assenting to an assignment for the benefit of creditors.<sup>16</sup> But it seems that the fact that one is the attorney of record in a judgment, does not warrant him in accepting a deed of trust for his client without being specially authorized to do so.<sup>17</sup> Under the present Bankruptcy Act an objection to the granting of a discharge must be made by "the trustees or other parties in interest;"<sup>18</sup> and to be a "party in interest" within the purview of this provision, one must have a pecuniary interest.<sup>19</sup> Exceptional circumstances, however, will warrant the signing and verification of objections to a discharge by the attorney of the objectors,<sup>20</sup> the reason therefor being disclosed in the affidavit;<sup>1</sup> but the practice is objectionable, and should only be adopted where no other course is open.<sup>2</sup> An

prove the same, or a ratification of the attorney's acts. *Nutting v. Kings County El. R. Co.*, 91 Hun 251, 36 N. Y. S. 142.

*With respect to the conduct of litigation*, however, an attorney is more than an agent. See *infra*, § 246 et seq.

<sup>14</sup> *State v. Hawkins*, 28 Mo. 366; *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 362; *Glass v. Davidson*, 1 Baxt. (Tenn.) 49.

<sup>15</sup> *Horseshoe Min. Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213.

<sup>16</sup> *Gordon v. Coolidge*, 1 Sumn. 537, 10 Fed. Cas. No. 5,606; *Vernon*

*v. Morton*, 8 Dana (Ky.) 247; *Jones v. Horsey*, 4 Md. 306, 59 Am. Dec. 81; *Hatch v. Smith*, 5 Mass. 42.

<sup>17</sup> *Doub v. Barnes*, 4 Gill (Md.) 1.

<sup>18</sup> Section 14b of the Bankruptcy Act (Fed. Stat. Annot. Supp. 1912, pp. 549, 550).

<sup>19</sup> *In re Levey*, 133 Fed. 572, 13 Am. Bankr. Rep. 314.

<sup>20</sup> *In re Milgraum*, 129 Fed. 827, 12 Am. Bankr. Rep. 306.

<sup>1</sup> *In re Baerneopf*, 117 Fed. 975, 9 Am. Bankr. Rep. 133.

<sup>2</sup> *In re Milgraum*, 129 Fed. 827, 12 Am. Bankr. Rep. 306; *In re Randall*, 159 Fed. 298, 20 Am. Bankr. Rep. 305.

attorney may also use his discretion in withdrawing resistance to the discharge of a bankrupt.<sup>3</sup>

§ 201. **Executing Bond for Client.** — The general rule is that an attorney has no implied authority to execute a bond on behalf of his client; thus he cannot so execute an appeal bond;<sup>4</sup> although in some instances the validity of such execution has been recognized where the bond was not required to be under seal.<sup>5</sup> Nor has an attorney any implied authority to execute a replevin,<sup>6</sup> injunction,<sup>7</sup> or indemnity bond.<sup>8</sup> But it has been held that an attorney has implied authority to bind his client by signing for him an attachment bond; this is on the theory that such bond is a necessary incident of the purpose of the attorney's employment in such a case,<sup>9</sup> and by statute in Georgia the attorney for plain-

<sup>3</sup> *Bennett v. Phillips*, 57 Ia. 174, 10 N. W. 328.

<sup>4</sup> *Schofield v. Felt*, 10 Colo. 146, 14 Pac. 128; *Gordon v. Camp*, 2 Fla. 23; *Love v. Sheffelin*, 7 Fla. 40; *Clark v. Courser*, 29 N. H. 170; *In re Holbrook*, 5 Cow. (N. Y.) 35; *Schaffer v. Troutwein*, (Okla.) 129 Pac. 696; *Murray v. Peckam*, 15 R. I. 297, 3 Atl. 662; *Coles v. Anderson*, 8 Humph. (Tenn.) 489. See, however, *Adams v. Robinson*, 1 Pick. (Mass.) 461.

Where an appeal is taken by a wife, whose husband is not a party to the suit, and is unrepresented by counsel of record, the signature of the bond of appeal, by the attorney of the wife, in the name of the husband, is not sufficient evidence of the latter's authorization to maintain the appeal, which must therefore be dismissed. *Gibson v. Hitchcock*, 35 La. Ann. 1201.

<sup>5</sup> *Bach v. Ballard*, 13 La. Ann. 487; *Adams v. Robinson*, 1 Pick. (Mass.) 462.

It is questionable whether, in such

cases, the client could not repudiate his attorney's act, and it may be advisable to file exceptions as a matter of precaution.

<sup>6</sup> *Narraguagus Land Proprietors v. Wentworth*, 36 Me. 339.

<sup>7</sup> *State Bank v. Wilson*, 10 La. Ann. 1; *Gauthier v. Gardenal*, 44 La. Ann. 884, 11 So. 463; *Luchini v. Police Jury*, 126 La. 972, 21 Ann. Cas. 59, 53 So. 68.

<sup>8</sup> *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027. Compare *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194.

<sup>9</sup> *Alexander v. Burns*, 6 La. Ann. 704; *Trowbridge v. Weir*, 6 La. Ann. 706. See also *Painter v. Gibson*, 88 Ia. 120, 55 N. W. 84.

Compare *Wetmore v. Daffin*, 5 La. Ann. 496, wherein it was held that an attorney of one state, having a general retainer to collect a debt against a resident thereof, has no authority to execute a bond in the name of his nonresident client, for the issuance of an attachment against the debtor in another state, to which he had temporarily gone.

tiff in certiorari may execute the bond.<sup>10</sup> Counsel may, of course, be authorized to execute bonds in behalf of their clients, and parol authority will be sufficient<sup>11</sup> excepting as to instruments required to be under seal.<sup>12</sup> So, also, the unauthorized execution of a bond by an attorney may be so ratified as to validate it.<sup>13</sup> An attorney may, of course, execute a bond as principal,<sup>14</sup> or as authorized by statute,<sup>15</sup> and may become a surety thereon, in the absence of a regulation to the contrary; but, as a rule, attorneys are prohibited from becoming sureties.<sup>16</sup>

**§ 202. Making or Altering Contracts.**—It has been stated heretofore that an attorney's authority to bind his client extends only to such acts and agreements as are necessary for the due prosecution of the cause or business in connection with which he has been employed;<sup>17</sup> he has no implied power to bind his client by an agreement collateral to, and independent of, the subject-matter of his employment;<sup>18</sup> nor can an attorney alter or vary the terms of a contract entered into by his client.<sup>19</sup> Thus the client

<sup>10</sup> *Foley & Williams Mfg. Co. v. Bell*, 4 Ga. App. 447, 61 S. E. 856.

<sup>11</sup> *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83.

<sup>12</sup> *Clark v. Courser*, 29 N. H. 170. See also *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83.

<sup>13</sup> *Nisbet v. Lawson*, 1 Ga. 275; *Narraguagus Land Proprietors v. Wentworth*, 36 Me. 339. See also *infra*, § 211.

<sup>14</sup> *Simpson v. Knight*, 12 Fla. 144; *Cunningham v. Tucker*, 14 Fla. 251.

<sup>15</sup> *Dillon v. Watkins*, 2 Speer L. (S. C.) 445.

<sup>16</sup> See *supra*, §§ 80, 81.

<sup>17</sup> See *supra*, § 199.

<sup>18</sup> *California*.—*Ephraim v. Pacific Bank*, 149 Cal. 222, 86 Pac. 507.

*Maine*.—*Ireland v. Todd*, 36 Me. 149.

*Missouri*.—*Wonderly v. Martin*, 69 Mo. App. 84; *Ratican v. Union Depot Co.*, 80 Mo. App. 528.

*North Dakota*.—*McLain v. Nurn-*

*berg*, 16 N. D. 144, 112 N. W. 243.

*South Carolina*.—*Annely v. DeSausure*, 12 S. C. 488.

*Virginia*.—*Herbert v. Alexander*, 2 Call 498.

An attorney for a railroad company in condemnation proceedings has not, merely by virtue of his retainer, power to bind the company by an agreement for the construction by the company of a cattle pass over its line. *Doran v. Great Western R. Co.*, 14 U. C. Q. B. 403.

An agreement by an attorney holding for collection a note given for corporate stock that, if the stock should prove worthless within a specified time, a renewal note should be surrendered to the maker on a return of the stock, binds the payee. *Baker Silver Min. Co. v. Steininger*, 4 Walk. (Pa.) 31.

<sup>19</sup> *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Lanum v. Patterson*, 143

will not be bound by the unauthorized agreement of his attorney to convey land<sup>20</sup> or other property;<sup>1</sup> nor by his agreement with the owner of an adjoining lot, whose house projects over the property of his client, that the projections may remain for a year in consideration of a certain sum;<sup>2</sup> nor by an agreement which would effect an equitable conversion;<sup>3</sup> nor by a contract of indemnity.<sup>4</sup> So, an attorney has no implied authority to make a lease, or confirm an imperfect one, or to perfect an inchoate agreement for

Ill. App. 244; *Mandeville v. Reynolds*, 68 N. Y. 528.

<sup>20</sup> *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *In re Amsterdam Ave.*, 112 App. Div. 160, 163, 165, 98 N. Y. S. 331, 334; *Burkhardt v. Schmidt*, 10 Phila. (Pa.) 118, 31 Leg. Int. 92; *Stilley v. McNeal*, 219 Pa. St. 533, 69 Atl. 58; *Scully v. Book*, 3 Wash. 182, 28 Pac. 556.

<sup>1</sup> *Kronsnable v. Knoblauch*, 21 Minn. 56; *Insurance Co. v. Roberts*, 6 Phila. (Pa.) 516, 25 Leg. Int. 28.

<sup>2</sup> *Walters v. Mitchell*, 6 Cal. App. 410, 92 Pac. 315.

<sup>3</sup> *Naglee v. Ingersoll*, 7 Pa. St. 185.

<sup>4</sup> *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

Where a client instructs his attorney not to persevere in an attachment of goods and a suit unless there is a good prospect of success, and the attorney knows or might know that the proceeds of the goods would be swallowed up by judgments on prior attachments, he has no authority to bind his client by a writing of indemnity to the attaching officer. *Nutt v. Merrill*, 40 Me. 237.

*Compare Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252, wherein it was held that an attorney for a client residing in another state is authorized to use all reasonable and usual means to secure his client's claim; he is au-

thorized to indemnify an officer for making a levy directed by him in good faith and upon reasonable grounds, and, if he indemnifies the officer by his own bond, he may recover from his client what he is obliged to pay thereon.

Where the garnishee in an attachment suit was induced to file an answer prepared by the plaintiff's attorney, under his assurance that she should be protected against certain notes outstanding in the hands of a third person, the agreement was held to be valid. *Hayes v. O'Connell*, 9 Ala. 488.

An attorney for clients who were nonresidents, having recovered for them a judgment, and issued execution thereon, executed in their name and on their behalf, but without express authority, an instrument under seal, indemnifying the sheriff against the claim of a third party to property in the possession of the judgment debtor, upon which the sheriff had levied the execution, which indemnity was necessary to preserve and continue the levy. It was held that, it not appearing but that the attorney acted in good faith and with reasonable discretion, his action was within the scope of his authority, even after judgment. *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194.

a lease;<sup>6</sup> nor can he agree to accept the surrender of a lease,<sup>6</sup> or to pay a sum of money for the surrender of possession,<sup>7</sup> or to pay a certain rent,<sup>8</sup> or to bind a landlord to pay for improvements made on the rented premises,<sup>9</sup> or to pay persons employed by the attorney,<sup>10</sup> or to support a debtor in jail,<sup>11</sup> or to pay a broker's commissions,<sup>12</sup> or to renew an indebtedness,<sup>13</sup> or to create a trust,<sup>14</sup> or to bind his principal by stipulations in a deed of trust taken to secure the debt of the principal,<sup>15</sup> or to pay a balance due on a mortgage,<sup>16</sup> or to suspend proceedings on a judgment,<sup>17</sup> or to agree to refund money voluntarily paid to his client as one of the distributees of an estate,<sup>18</sup> or to contract for his client to pay the latter's wife a sum of money as part of a separation agreement,<sup>19</sup> or to employ associate counsel,<sup>20</sup> or to take a case out of the statute of limitations.<sup>1</sup> The unauthorized agreements of an attorney may, of course, be validated by ratification.<sup>2</sup> The burden of proving

<sup>6</sup> Howard v. Carpenter, 11 Md. 259.

<sup>7</sup> Johnstown & F. R. Co. v. Egbert, 152 Pa. St. 53, 25 Atl. 151.

<sup>8</sup> Stuck v. Reese, 15 Ia. 122.

<sup>9</sup> Hubbard v. Shaw, 12 Allen (Mass.) 120.

<sup>10</sup> McMichen v. Brown, 10 Ga. App. 506, 73 S. E. 691.

<sup>11</sup> The fact that the attorney of plaintiff in a fl. fa. directed the sheriff to put a watchman in charge of goods levied on, does not imply a promise that plaintiff would pay for the watchman's services; the sheriff being bound to keep the goods safely. Deal v. Tower, 1 Phila. (Pa.) 268, 8 Leg. Int. 238.

<sup>12</sup> Hogan v. Hutton, 20 N. J. L. 82.

<sup>13</sup> Callaway v. Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900.

<sup>14</sup> Houghton v. Ellis, 19 Colo. App. 125, 73 Pac. 752.

<sup>15</sup> Ratican v. Union Depot Co., 80 Mo. App. 528.

<sup>16</sup> Pendexter v. Vernon, 9 Humph. (Tenn.) 84.

<sup>17</sup> Thomas v. Wiltbank, 6 W. N. C. (Pa.) 477, 36 Leg. Int. 105.

*One employed both as attorney and agent to manage and conduct proceedings to collect a chattel mortgage, has authority to bind his client to pay off, out of the proceeds of the property, a superior lien upon it in favor of another creditor which is being enforced by levy, and thereby free the property from such levy and lien. Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666.*

<sup>18</sup> Pendexter v. Vernon, 9 Humph. (Tenn.) 84.

<sup>19</sup> Miller v. Hulme, 126 Pa. St. 277, 17 Atl. 587, 24 W. N. C. 131.

<sup>20</sup> Joseph v. Platt, 130 App. Div. 478, 114 N. Y. S. 1065.

<sup>21</sup> Johnston v. Baca, 13 N. M. 338, 85 Pac. 237. See also *infra*, § 210.

<sup>1</sup> Pequamick Co. v. Brady, 1 Phila. (Pa.) 220, 8 Leg. Int. 126.

<sup>2</sup> Hardin v. Osborne, 60 Ill. 93. See also *infra*, §§ 211-214.

the attorney's authority, or the ratification of his act, rests with the party seeking the benefit thereof.<sup>3</sup>

*Disposition of Choses and Other Property—Collection and Receipt of Money.*

**§ 203. Disposition of Client's Choses or Other Property. —**

An attorney at law has no implied authority to sell or assign the claim of his client,<sup>4</sup> even though he is authorized to compromise it.<sup>5</sup> Thus where a note has been placed in the hands of an attorney for collection, he has no power to transfer it to another;<sup>6</sup> nor can

<sup>3</sup> Brooks v. Kearns, 86 Ill. 547.

<sup>4</sup> Illinois.—Schroeder v. Wolf, 227 Ill. 133, 81 N. E. 13. *affirming* 127 Ill. App. 506.

Ohio.—Card v. Walbridge, 18 Ohio 411.

Pennsylvania.—Rowland v. Slate, 58 Pa. St. 196.

South Carolina.—Noonan v. Gray, 1 Bailey L. 437.

Vermont.—Penniman v. Patchin, 5 Vt. 346.

In Annelly v. DeSaussure, 12 S. C. 509, it was said: "The relation of attorney and client implies authority to enforce the demands of his client, of obtaining either voluntary or coercive satisfaction of such demands, and to bind the client as a party litigant in certain matters appertaining to the conduct of causes; but it does not confer a general power of attorney to contract independently in relation to such demands, nor to transfer such demands to a third party. The proper duty of a counselor is to advise his clients; if he becomes a negotiator, a business manager, it is through some other form of authorization than that implied in being selected as a legal adviser merely."

<sup>5</sup> Mayer v. Blease, 4 S. C. 10. See also *infra*, § 215 et seq.

<sup>6</sup> Alabama.—Craig v. Ely, 5 Stew. & P. 354.

Indiana.—Russell v. Drummond, 6 Ind. 216.

Kansas.—Eggen v. Briggs, 23 Kan. 710.

Michigan.—Brown v. People's Nat. Bank, 170 Mich. 416, 136 N. W. 506.

Missouri.—Goodfellow v. Landis, 36 Mo. 168; Feiner v. Puetz, 77 Mo. App. 405.

New Hampshire.—White v. Hildreth, 13 N. H. 104; Child v. Eureka Powder Works, 44 N. H. 354.

New Jersey.—Terhune v. Colton, 10 N. J. Eq. 21.

North Carolina.—Sherrill v. Weisiger Clothing Co., 114 N. C. 436, 19 S. E. 365.

Ohio.—Card v. Walbridge, 18 Ohio 411.

Pennsylvania.—Rowland v. Slate, 58 Pa. St. 196.

South Carolina.—Noonan v. Gray, 1 Bailey L. 437.

Vermont.—Penniman v. Patchin, 5 Vt. 346.

But see Alden v. Dyer, 92 Minn. 134, 99 N. W. 784, wherein it appears that a note, to which was attached a condi-

he discount,<sup>7</sup> exchange,<sup>8</sup> or indorse it, for that purpose;<sup>9</sup> and where the client's chose is so transferred, assumpsit for money had and received lies in his favor against the assignee.<sup>10</sup> So, an attorney has no implied power to authorize the sale of his client's land<sup>11</sup> or personal property,<sup>12</sup> or to transfer a certificate of purchase therefor,<sup>13</sup> or a bond taken in payment of his client's judgment.<sup>14</sup> An attorney who receives money for his client is not justified in paying it to a third person, who claims it, without indemnity; nor is he justified, after notice of the claim, in paying it over to his principal, until the rights of the claimant are settled.<sup>15</sup> So, an attorney has no authority, by the mere virtue of

tion that the ownership of the property for which it was given should remain in the vendor upon default of payment, was sent to an attorney, in another state, who brought action to recover the debt, and secured judgment thereon. It was held that the sending of the note and conditional agreement to the attorney presumably authorized the latter to use all lawful means to collect the debt within his judgment and discretion.

<sup>7</sup> *Goodfellow v. Landis*, 36 Mo. 188.

<sup>8</sup> *Tankersley v. Anderson*, 4 Desaus. (S. C.) 44.

<sup>9</sup> *White v. Hildreth*, 13 N. H. 104; *Chatham Nat. Bank v. Hochstadter*, 27 Alb. L. J. (N. Y.) 133; *Sherrill v. Weisiger Clothing Co.*, 114 N. C. 436, 19 S. E. 365.

<sup>10</sup> *Penniman v. Patchin*, 5 Vt. 346.

<sup>11</sup> *Spinks v. Athens Sav. Bank*, 108 Ga. 376, 33 S. E. 1003; *Corbin v. Mulligan*, 1 Bush (Ky.) 297; *Gray v. Howell*, 205 Pa. St. 211, 54 Atl. 774.

<sup>12</sup> *Davis v. Ferrin*, 97 Me. 146, 53 Atl. 1006.

The general employment of an attorney at law as counsel for the receiver of a bankrupt, does not authorize the attorney to make a sale of the bankrupt's assets, nor to take

the proceeds thereof. *Mason v. Wolkowich*, 150 Fed. 699, 80 C. C. A. 435, 10 L.R.A. (N.S.) 765.

An agreement by the bankrupt's attorney with a creditor that the bankrupt would keep certain goods sold to him by the creditor, and that the claim for the value thereof should not be proven in bankruptcy, and that they would be paid for, was not binding on the bankrupt, where he neither authorized, ratified, nor received any benefits therefrom. *Gambrell v. Southern Moline Plow Co.*, (Miss.) 60 So. 1012.

<sup>13</sup> A purchase of land in his own name made by the attorney of an execution plaintiff, taking to himself a certificate of purchase, and merely paying the costs, but no part of the execution, and, as attorney, giving the sheriff a receipt for the amount of the judgment, is the purchase of the execution plaintiff; and such attorney cannot without his authority assign the certificate of purchase. *Hays v. Cassell*, 70 Ill. 669. See also *supra*, §§ 158, 166.

<sup>14</sup> *Kirk v. Glover*, 5 Stew. & P. (Ala.) 340.

<sup>15</sup> *Peyser v. Wilcox*, 64 How. Pr. (N. Y.) 525.



his relationship, to apply the property of the client to the payment of the client's debts.<sup>16</sup> Nor has an attorney any implied authority to distribute money received for his client;<sup>17</sup> thus an attorney authorized by salvors to settle their claims against the vessel, has no authority to distribute money received thereon, on his own judgment, among the salvors, or to pay charges against the fund.<sup>18</sup> Where a client delivers money to his attorney for distribution to certain persons, the deposit thereof by the attorney in a bank to his own credit does not constitute a conversion where the amount is kept good until the client directs a different disposition of the money.<sup>19</sup>

**§ 204. Receipt of Money for Client Generally.**—An attorney at law undoubtedly has the right to receive money in payment of the debt or demand of his client, for the collection or enforcement of which the attorney was employed.<sup>20</sup> The power

<sup>16</sup> *Gordon v. Sanborn*, (Tex.) 35 S. W. 291.

*Disposition of Money Deposited for Bail.*—Where one arrested on a charge of violating a city ordinance gave an invalid recognizance in \$300 to appear for trial, but failed to appear, and money to that amount, taken from him by the arresting officer, was placed in the hands of the city attorney, it was held that an attorney merely retained in the defense had no authority to direct that the money be paid into the city treasury. *Bloomington v. Heiland*, 67 Ill. 278.

<sup>17</sup> *Hale v. Passmore*, 4 Dana (Ky.) 70. See also *White v. Ward*, 157 Ala. 345, 47 So. 166, 18 L.R.A. (N.S.) 568; *Miller v. Penniman & Bro.*, 110 Va. 780, 67 S. E. 516.

*Where the surplus arising from the sale of a homestead under a mortgage foreclosure is, under order of the court, paid to the attorney of a judgment creditor of the mortgagor, in satisfaction of his judgment, the at-*

*torney is liable to the mortgagor for any part of the amount not turned over to his client.* *Mitchell v. Milhoan*, 11 Kan. 617.

*Compare Webb v. White*, 18 Tex. 572, wherein it was held that an attorney, having in his control four several executions against an insolvent defendant, levied three of them upon cotton, and took it at an agreed price per pound, the fourth execution being at the time only ordered, and not in the officer's hands, had the right to apply the amount *pro rata* among all four executions.

<sup>18</sup> *Hawkins v. Avery*, 32 Barb. (N. Y.) 551.

<sup>19</sup> *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>20</sup> *United States v. Bates v. Seabury*, 1 Sprague 433, 2 Fed. Cas. No. 1,104; *Abrahamson v. The Canonicus*, 65 Fed. 525.

*Alabama.*—*Henderson v. Planters' & Merchants' Bank*, 59 So. 493.

to sue for a debt implies the power to collect it.<sup>1</sup> Thus the attorney of record may receive payment of a judgment,<sup>2</sup> or execution;<sup>3</sup> and where a debtor pays money to an attorney who represents several creditors, and does not designate the debt to which he wishes it to be applied, the attorney may apply it.<sup>4</sup> Payment by the clerk of a court, in which money is deposited, to the attorney of the party entitled to receive it, will discharge the clerk from all liability;<sup>5</sup> but, should it be questioned, the court may order the attorney to show his authority to receive such money.<sup>6</sup> Tender of the amount admitted to be due may also be made to the duly authorized attorney of the creditor.<sup>7</sup> But the attorney cannot, ordinarily, delegate his authority to another without his client's consent;<sup>8</sup> nor can he accept a payment of less than the amount

*Kentucky*.—Ely v. Harvey, 6 Bush 620.

*Maine*.—Ducett v. Cunningham, 39 Me. 386; White v. Johnson, 67 Me. 287.

*Michigan*.—Duquette v. Richar, 102 Mich. 483, 80 N. W. 974.

*Missouri*.—Carroll County v. Cheatham, 48 Mo. 385.

*Nebraska*.—Gordon v. Omaha, 77 Neb. 556, 110 N. W. 313.

*New York*.—Hawkins v. Avery, 32 Barb. 551; Fullerton v. National Burglar & Theft Ins. Co., 63 How. Pr. 5, 10 Abb. N. C. 364; Kirchner v. Schmid, 7 Misc. 455, 25 N. Y. S. 85; Conner v. Watson, 29 Civ. Pro. 153, 27 Misc. 444, 59 N. Y. S. 213.

*Ohio*.—Nolte v. Hulbert, 37 Ohio St. 445, affirming 5 Ohio Dec. (Reprint) 485, 6 Am. L. Rec. 247, 7 Ohio Dec. (Reprint) 398, 2 Cinc. L. Bul. 294.

*Pennsylvania*.—See Bartoletti v. Achey, 38 Pac. St. 273.

*South Carolina*.—Commissioners of Public Accounts v. Rose, 1 Desaus 461; Treasurers v. McDowell, 1 Hill L. 184, 26 Am. Dec. 166.

*Virginia*.—Hudson v. Johnson, 1 Wash. 10.

<sup>1</sup> Planters' Bank v. Massey, 2 Heisk. (Tenn.) 360.

<sup>2</sup> See *infra*, § 276.

<sup>3</sup> See *supra*, § 276.

<sup>4</sup> Carpenter v. Goin, 19 N. H. 479.

<sup>5</sup> Mourain v. Beauvais, 10 La. 477; New Orleans v. Hennen, 18 La. 428; Hiller v. Ivy, 37 Miss. 431.

<sup>6</sup> Atty.-Gen. v. North-America L. Ins. Co., 93 N. Y. 387.

<sup>7</sup> Erwin v. Blake, 8 Pet. 18, 8 U. S. (L. ed.) 852; McNiffe v. Wheelock, 1 Gray (Mass.) 600; Brown v. Mead, 68 Vt. 215, 34 Atl. 950.

<sup>8</sup> *Attorney's Wife Has No Authority to Receive Payment*.—In Day v. Boyd, 6 Heisk. (Tenn.) 458, it appeared that, during the absence of an attorney from home, his wife received and opened a letter addressed to him, containing a draft payable to his order for collection. The drawee paid the draft to the wife on her presenting it. It did not appear that the wife had any general or special authority to act for her husband in professional matters, but the attorney had placed some individual claims for collection in the hands of the defendant and instructed him to pay over any moneys

due,<sup>9</sup> or payment otherwise than in money,<sup>10</sup> or release,<sup>11</sup> or compromise the claim;<sup>12</sup> and the debtor is bound to take notice of the extent of the attorney's authority.<sup>13</sup> Where the relation of attorney and client has ceased,<sup>14</sup> the authority of the attorney to receive money for his former client also ceases;<sup>15</sup> so, payment to an attorney with knowledge of the fact that another has been substituted in his stead, will not bind the client.<sup>16</sup> The authority of an attorney to receive payment for his client may be revoked,<sup>17</sup> but such revocation will not affect one who has no knowledge, or reason to know of it.<sup>18</sup>

**§ 205. On Claims Held for Collection.**—An attorney to whom a claim has been given for collection is thereby duly authorized to receive the amount due thereon from the debtor,<sup>19</sup>

that should come to his hands for said attorney to his wife. The court held that the wife had no authority to receive payment of the draft, and that the drawee was therefore not discharged by virtue of the payment to her.

See *infra*, § 210.

<sup>9</sup> See *infra*, § 220.

<sup>10</sup> See *infra*, § 219.

<sup>11</sup> See *infra*, § 219 et seq.

<sup>12</sup> See *infra*, § 215.

<sup>13</sup> *Cram v. Sickel*, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

<sup>14</sup> See *supra*, §§ 137-142.

<sup>15</sup> *Gordon v. Hennings*, 89 Neb. 252, 131 N. W. 228; *Willis v. Gorrell*, 102 Va. 746, 47 S. E. 826.

Where the relation of attorney and client is changed to that of trustee and *cestui que trust*, the trustee's power to receive payment is to be determined from the agreement or appointment creating the trust relation, and not from the general rule creating the relation of attorney and client. *Scott v. State*, 2 Md. 284. See also *Hinkle v. Wanzer*, 17 How. 353, 15

U. S. (L. ed.) 173; *Farmers' Bank v. Mackall*, 3 Gill (Md.) 447; *Kirchner v. Schmid*, 7 Misc. 455, 25 N. Y. S. 85.

<sup>16</sup> *In re Bleakley*, 5 Paige (N. Y.) 311; *Weist v. Lee*, 3 Yeates (Pa.) 47.

<sup>17</sup> *Weist v. Lee*, 3 Yeates (Pa.) 47. See also *Swartz v. Earls*, 53 Ill. 237.

In *Parker v. Downing*, 13 Mass. 465, it appeared that an officer, who had collected money upon an execution, paid it to the creditor's attorney of record in the action, whose power had been revoked before the execution was delivered, and it was held to be no discharge of the officer.

<sup>18</sup> *Ruckman v. Alwood*, 44 Ill. 183; *Cameron v. Stratton*, 14 Ill. App. 270; *Gordon v. Omaha*, 77 Neb. 556, 110 N. W. 313; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738.

<sup>19</sup> *United States*.—*Erwin v. Blake*, 8 Pet. 18, 8 U. S. (L. ed.) 852; *Chouteau v. U. S.*, 95 U. S. 61, 24 U. S. (L. ed.) 371; *National Bank of the Republic v. Old Town Bank*, 112 Fed. 726, 50 C. C. A. 443; *Leshner v. Radel*, 170 Fed. 723.

and as incident thereto. power to indorse a draft given in payment.<sup>20</sup> So, also, the fact that an attorney has possession of the evidence of indebtedness creates a presumption of authority in him to receive payment thereon;<sup>1</sup> but to justify payments to an attorney whose only known authority is the possession of the evidence of indebtedness, it must appear that it was in his pos-

*Arkansas.*—*Miller v. Scott*, 21 Ark. 396; *Conway County v. Little Rock, etc.*, R. Co., 39 Ark. 50.

*Indiana.*—*Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006.

*Iowa.*—*McCarver v. Nealey*, 1 G. Greene 360.

*Kansas.*—*Dolan v. VanDemark*, 35 Kan. 304, 10 Pac. 848.

*Kentucky.*—*Ely v. Harvey*, 6 Bush 620.

*Louisiana.*—*New Orleans v. Hennen*, 13 La. 428.

*Maine.*—*Gray v. Wass*, 1 Greenl. 257; *Patten v. Fullerton*, 27 Me. 58; *Ducett v. Cunningham*, 39 Me. 386.

*Massachusetts.*—*Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197.

*Mississippi.*—*Hiller v. Ivy*, 37 Miss. 431.

*Missouri.*—*Carroll County v. Cheat-ham*, 48 Mo. 385; *Whelan v. Reilly*, 61 Mo. 565; *Rhinehart v. New Madrid Banking Co.*, 99 Mo. App. 381, 73 S. W. 315.

*Nebraska.*—*Ward v. Beals*, 14 Neb. 114, 15 N. W. 353.

*New York.*—*Megary v. Funtis*, 5 Sandf. 376; *Conner v. Watson*, 27 Misc. 444, 20 Civ. Pro. 153, 59 N. Y. S. 213; *Kramer v. Grant*, 60 Misc. 109, 111 N. Y. S. 709.

*North Carolina.*—*Rogers v. McKenzie*, 81 N. C. 164.

*Ohio.*—*Bryans v. Taylor*, *Wright* 245.

*South Carolina.*—*Cone v. Brown*, 15

*Rich. L.* 262; *Canthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978.

*Virginia.*—*Hudson v. Johnson*, 1 Wash. 10; *Branch v. Burnley*, 1 Call 147; *Wilkinson v. Holloway*, 7 Leigh 277; *Johnson v. Gibbons*, 27 Gratt. 632.

*West Virginia.*—*Ellis v. Heptinstall*, 8 W. Va. 388; *Wiley v. Mahood*, 10 W. Va. 223; *Donahue v. Fackler*, 21 W. Va. 124.

<sup>20</sup> *National Fire Ins. Co. v. Eastern Bldg., etc., Assoc.*, 63 Neb. 698, 88 N. W. 863, *affirmed on rehearing* 65 Neb. 483, 91 N. W. 482.

<sup>1</sup> *England.*—*Owen v. Barrow*, 1 B. & P. N. R. 101.

*California.*—*In re Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169.

*Maine.*—*Patten v. Fullerton*, 27 Me. 58; *Ducett v. Cunningham*, 39 Me. 386; *White v. Johnson*, 67 Me. 290.

*Maryland.*—*Forbes v. Perrie*, 1 Har. & J. 109.

*Missouri.*—*Whelan v. Reilly*, 61 Mo. 565.

*Nebraska.*—*Ward v. Beals*, 14 Neb. 114, 15 N. W. 353.

*New York.*—*Leet v. McMaster*, 51 Barb. 236; *Williams v. Walker*, 2 Sandf. Ch. 325; *Megary v. Funtis*, 5 Sandf. 376; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; *Central Trust Co. v. Folsom*, 26 App. Div. 40, 49 N. Y. S. 670.

session on each occasion when payments were made.<sup>2</sup> And, on the other hand, an attorney may have authority to collect for his principal a note and mortgage without having the same in his possession.<sup>3</sup> It is also clear that in some cases the mere possession of the paper evidence of an indebtedness would not be sufficient to warrant payment to the possessor.<sup>4</sup> Thus the court said in one

*Ohio*.—*Antioch College v. Carroll*, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

*South Carolina*.—*Cone v. Brown*, 15 Rich. L. 262.

*Texas*.—*Donley v. Cundiff*, 35 Tex. 741.

*Virginia*.—*Hudson v. Johnson*, 1 Wash. 10.

<sup>2</sup> *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Antioch College v. Carroll*, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

<sup>3</sup> *Orient Ins. Co. v. Hayes*, 61 Neb. 173, 85 N. W. 57.

<sup>4</sup> *Presumption Arising from Possession of Bond and Mortgage*.—In *Central Trust Co. v. Folsom*, 26 App. Div. 40, 49 N. Y. S. 670, it was held that an attorney had no implied authority to receive payment of the principal of a bond or mortgage in his possession where it appeared that he did not make the investment originally; that there had been an assignment of the bond and mortgage which he was not in possession of, and that his possession of the bond and mortgage was obtained in an undisclosed manner; although it further appeared that he had received, by authority of the assignee, one payment of the interest. The court said: "The rule is, that where a solicitor who makes the loan receives the interest and has the securities in his possession at the time

of payment of the principal, that principal being due, the person paying the money may rely upon the apparent authority of the attorney or solicitor to receive that money. The authority is not to be inferred only from the attorney having received interest, nor from the mere possession of the security, but it must result from the whole control of the investment, from beginning to end, by the attorney or solicitor. The lender must part with his money to the solicitor for investment and give him absolute control of the whole matter. The rule was referred to in *Smith v. Kidd*, 68 N. Y. 130, but the payment was held to be ineffectual there because the attorney did not have the possession of the securities, although he originally made the loan and received the interest. In *Crane v. Gruenewald*, 120 N. Y. 274 the rule is referred to both in the opinion of the court and in the dissenting opinion. It is referred to by Parker, J., as follows: 'If a mortgagee permits an attorney who negotiates a loan to retain in his possession the bond and mortgage after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities

case: "We should long hesitate to hold that a maker of a note may safely pay it to one who has stolen it from the payee, and who falsely pretends to hold it for collection, in the absence of any other evidence of authority than the bare possession. Yet this is the result of the doctrine as claimed."<sup>5</sup> So, after an attorney who has in his hands a debt for collection reports the same as properly secured, and both debtor and creditor thereafter treat the debt so secured as an investment, and the debtor regularly, for a period of ten years, pays the semiannual interest directly to the creditor, the debt cannot thereafter be regarded as in the hands of the attorney for collection, although he still retains the evidence of it.<sup>6</sup> The fact that an attorney was employed by one proposing to loan money on bond and mortgage to draw the papers, and that the money was advanced upon the securities through the attorney, is no proof of authority upon his part to collect the principal;<sup>7</sup> nor can it be inferred that an attorney was authorized to receive the principal, from the fact that he had authority to collect the interest.<sup>8</sup> The right to compromise a claim held for collection has been considered heretofore.<sup>9</sup>

indicated that he had:' and Potter, J., refers to the rule as being sufficient evidence of authority if the attorney who negotiated the loan is subsequently intrusted by the creditor with the possession of the bond and mortgage. So in *Doubleday v. Kress*, 50 N. Y. 410, it is said that payment of the principal to the agent who took the security or negotiated the loan for which the security was taken, and was thereafter intrusted by the owner with its possession, is sufficient, and the payment is valid; and Peckham, J., states that the reason of the rule that one who has made the loan as agent and taken the security is authorized to receive payment when he retains possession of the security, is founded upon human experience, that the payer knows that the agent has been trusted by the payee about the same

business, and he is thus given a credit with the payer."

<sup>5</sup> *Nolte v. Hulbert*, 37 Ohio St. 445, affirming 5 Ohio Dec. (Reprint) 485, 6 Am. L. Rec. 247, 7 Ohio Dec. (Reprint) 398, 2 Cinc. L. Bul. 294.

<sup>6</sup> *Willis v. Gorrell*, 102 Va. 746, 47 S. E. 826.

<sup>7</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157.

<sup>8</sup> *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Central Trust Co. v. Folsom*, 26 App. Div. 40, 49 N. Y. S. 670.

<sup>9</sup> See the preceding section and the cross-references therein given.

*Partial payments* may be received on claims held for collection. *Pickett v. Bates*, 3 La. Ann. 627; *Whelan v. Reilly*, 61 Mo. 565; *Williams v. Walker*, 2 Sandf. Ch. (N. Y.) 325. But see *supra*, § 204.

§ 206. **Right to Demand Payment.** — The authority of an attorney to receive payment on behalf of his client carries with it the right to demand payment;<sup>10</sup> and, in the absence of objection on that ground, it may be presumed that he was authorized to make such demand.<sup>11</sup> A demand on the sheriff by the attorney of record, to pay over money collected by him on a specific execution, is, in law, a demand by the plaintiff,<sup>12</sup> and the officer is justified in making the payment unless expressly directed not to do so.<sup>13</sup> So, a demand of dower may be signed by attorney.<sup>14</sup> Without authority express or implied a demand by an attorney would, of course, be ineffective.<sup>15</sup>

§ 207. **Extending Time of Payment.** — The extension of the time of payment is not within the ordinary scope of the duty of an attorney at law, and, unless specially authorized by the client, is not binding upon him.<sup>16</sup> And such an attempted extension of time will not discharge a surety.<sup>17</sup> Thus he cannot extend the time for the payment of a mortgage debt owned by the client,<sup>18</sup>

<sup>10</sup> *Spence v. Rutledge*, 11 Ala. 557; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; *Pettis v. Kellogg*, 7 Cush. (Mass.) 456; *Cady v. Fair Plain Literary Assoc.*, 135 Mich. 295, 97 N. W. 680, 10 Detroit Leg. N. 725.

*Demand of Deposit.*—The relation of attorney and client not having terminated, the former may rightfully demand a county order deposited by him for the client as security for the sureties on an attachment bond. *Champion Iron Fence Co. v. Wernsing*, 19 Ill. App. 42.

<sup>11</sup> *Elwell v. Prescott*, 38 Wis. 274.

<sup>12</sup> *Spence v. Rutledge*, 11 Ala. 557.

<sup>13</sup> *Williams v. State*, 65 Ark. 159, 40 S. W. 186; *Butler v. Jones*, 7 How. (Miss.) 587, 40 Am. Dec. 82; *Hiller v. Ivy*, 37 Miss. 431.

<sup>14</sup> *Stevens v. Reed*, 37 N. H. 49.

Where an attorney, having authority to make demand for dower in one

parcel, makes demand for two, the demand is not vitiated as to the parcel with reference to which he was authorized. *McAllister v. Dexter, etc.*, R. Co., 106 Me. 371, 21 Ann. Cas. 486, 76 Atl. 891, 29 L.R.A. (N.S.) 734.

<sup>15</sup> *Dumartrait v. Kemper*, 28 La. Ann. 620.

<sup>16</sup> *Lockhart v. Wyatt*, 10 Ala. 231, 44 Am. Dec. 481; *Nolan v. Jackson*, 16 Ill. 272; *Roberts v. Smith*, 3 La. Ann. 305; *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507; *Hall v. Presnell*, 157 N. C. 290, Ann. Cas. 1913B 1293, 72 S. E. 985, 39 L.R.A. (N.S.) 62; *Pendexter v. Vernon*, 9 Humph. (Tenn.) 84. And see *Varnum v. Bellamy*, 4 McLean 87, 28 Fed. Cas. No. 16,886.

<sup>17</sup> *Hall v. Presnell*, 157 N. C. 290, Ann. Cas. 1913B 1293, 72 S. E. 985, 39 L.R.A. (N.S.) 62.

<sup>18</sup> *Haselton v. Florentine Marble Co.*, 94 Fed. 701.

nor can he receive part of the debt, and postpone payment of the residue,<sup>19</sup> nor can he grant a mortgagor an extension of the time for redemption in consideration of his placing improvements upon the property.<sup>20</sup> So, where a judgment in ejectment is entered by agreement, to be released on payment of a certain sum on or before a certain day, the plaintiff's attorney cannot, without express authority, bind him by an agreement to extend the time.<sup>1</sup> In some jurisdictions, however, the courts have recognized an implied authority on the part of attorneys to extend the time of payment as to claims placed with them for collection.<sup>2</sup> One dealing with an attorney employed solely to collect a debt must take notice of such attorney's lack of authority to grant extensions of time to the debtor.<sup>3</sup>

### § 208. Receipts of Money Outside Scope of Employment.

— When the authority of an attorney, not of record, to receive payment of a debt, is disputed, proof thereof is required as in other cases of agency,<sup>4</sup> as it is well settled that an attorney has no authority to receive money owing to his client in a matter outside of the scope of his employment;<sup>5</sup> but the debtor will not be preju-

<sup>19</sup> *Heyman v. Beringer*, 1 Abb. N. Cas. (N. Y.) 315.

<sup>20</sup> *Osborn v. Storms*, 65 Ind. 321.

<sup>1</sup> *Beatty v. Hamilton*, 127 Pa. St. 71, 17 Atl. 755.

<sup>2</sup> *Potter v. Parsons*, 14 Ia. 286; *Crawford v. Nolan*, 70 Ia. 97, 30 N. W. 32. See also *Phillips v. Rounds*, 33 Me. 357, wherein it was held that an attorney, appointed to act for a creditor at the disclosure of his debtor, who had given a relief bond, had authority to extend the time for such debtor to make the disclosure, although such extension might have the effect to release a surety in the bond. The decision was influenced by a statute authorizing attorneys to compromise their clients' cases.

<sup>3</sup> *Hall v. Presnell*, 157 N. C. 290,

Ann. Cas. 1913B 1293, 72 S. E. 985, 39 L.R.A. (N.S.) 62.

<sup>4</sup> *Batesville Bank v. Maxey*, 76 Ark. 472, 88 S. W. 968; *Barr's Succession*, 8 La. Ann. 458.

<sup>5</sup> *United States*.—*Bauman v. Eschallier*, 184 Fed. 710, 107 C. C. A. 44. *Illinois*.—*Schroeder v. Wolf*, 127 Ill. App. 506, *affirmed* 227 Ill. 133, 81 N. E. 13.

*Louisiana*.—*Lambeth v. New Orleans*, 6 La. 731.

*Massachusetts*.—*Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

*Missouri*.—*Ashby v. Winston*, 34 Mo. 311.

*New York*.—*Kirchner v. Schmid*, 7 Misc. 455, 25 N. Y. S. 85.

*Oregon*.—*Kelsay v. Taylor*, 56 Ore. 13, 107 Pac. 609.



ditionally affected by any secret arrangement between the attorney and his client, by which the apparent authority of the attorney to receive payment of the client's claims is curtailed, and which have not been disclosed to the debtors.<sup>6</sup> Thus the employment of an attorney to draw papers on which money is advanced, is no proof of authority upon his part to collect the principal, where he has not been entrusted with the custody of the securities.<sup>7</sup> So, authority to place loans and to collect interest does not authorize the collection of the principal, in the absence of the possession of the evidence of indebtedness.<sup>8</sup> The mere employment of an attorney to foreclose a mortgage, does not give him authority to receive from the sheriff money paid, after foreclosure, to redeem the property.<sup>9</sup> Nor does the employment of an attorney at law to examine the title to lands on which a mortgage loan is about to be made, authorize him to receive, as agent of the proposed lender, his employer, money, from the borrower, to be used in satisfying prior liens.<sup>10</sup> So, the employment of an attorney to defend a suit does not authorize him to receive from the sheriff the proceeds of the defendant's property sold under a judgment recovered in that suit.<sup>11</sup> Nor does employment to foreclose a mortgage give any right to receive the redemption money after foreclosure.<sup>12</sup> Where an execution defendant placed a claim in the hands of the plain-

*Pennsylvania*.—Kephart v. Zeek, 151 Pa. St. 423, 25 Atl. 106, 31 W. N. C. 89; Bryant v. Hamlin, 3 Pa. Dist. Ct. 385; Com. v. Commissioners, 1 Chest. Co. Rep. 349.

*Texas*.—Cundiff v. McLean, 40 Tex. 301.

<sup>6</sup> State v. Hawkins, 28 Mo. 366; Tito v. Seabury, 18 Misc. 283, 41 N. Y. S. 1041; Glass v. Davidson, 1 Baxt. (Tenn.) 47; Planters' Bank v. Massey, 2 Heisk. (Tenn.) 362.

*Compare* Cameron v. Stratton, 14 Ill. App. 270, wherein it was held that one who pays the amount of a judgment to an attorney who is employed not generally but specially only, pays at his peril.

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<sup>7</sup> Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Bryant v. Hamlin, 3 Pa. Dist. Ct. 385.

<sup>8</sup> Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Central Trust Co. v. Folsom, 26 App. Div. 40, 49 N. Y. S. 670; Antioch College v. Carroll, 11 Ohio Dec. (Reprint) 220, 25 Cinc. L. Bul. 289.

<sup>9</sup> In re Grundysen, 53 Minn. 346, 55 N. W. 557.

<sup>10</sup> Josephthal v. Heyman, 2 Abb. N. Cas. (N. Y.) 22.

<sup>11</sup> Germaine v. Mallerich, 31 La. Ann. 371.

<sup>12</sup> In re Grundysen, 53 Minn. 346, 55 N. W. 557.

tiff's attorney, with instructions to collect it and apply it to the *fi. fa.* against him, and the attorney collected the claim, but failed to apply it as directed, the plaintiffs are not bound to recognize the collection as a payment to them.<sup>13</sup> An attorney employed by an administrator to obtain an order of sale is not, by virtue of such employment, authorized to receive the purchase price.<sup>14</sup> The attorney of a guardian *ad litem* has no greater power than the guardian himself, and hence, where the guardian was not legally authorized to receive the proceeds of a settlement of his ward's cause of action, payment to the attorney does not constitute satisfaction of the claim.<sup>15</sup> And where a solicitor to a complainant in a cause is appointed a trustee to manage the fund in controversy, and he receives money without authority as such trustee, and wastes the same, the payment to the trustee cannot be considered a payment to the complainant.<sup>16</sup> A payment made to an attorney after the termination of the professional relation will not, of course, bind the former client.<sup>17</sup> But the unauthorized receipt of money by an attorney may be ratified by the person for whom he presumed to act, and, in such case, it will be binding.<sup>18</sup>

**§ 209. Authority to Resort to Criminal Proceedings.** — An authority to institute legal proceedings for the purpose of collecting a debt, must be construed as an authority to commence civil suits only; it cannot be construed as authority to proceed criminally against the debtor.<sup>19</sup>

#### *Delegation of Authority.*

**§ 210. Generally.** — The general rule is that an attorney at law, by virtue of his ordinary powers, cannot delegate his authori-

<sup>13</sup> *Pease v. Dibble*, 57 Ga. 446; *Price v. White*, 70 Ga. 381; *Bradford v. Arnold*, 33 Tex. 412.

<sup>14</sup> *Nolan v. Jackson*, 16 Ill. 272.

<sup>15</sup> *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. S. 819.

<sup>16</sup> *Farmers' Bank v. Mackall*, 3 Gill (Md.) 447.

<sup>17</sup> *Hallam v. Coulter*, 115 Ky. 313, 73 S. W. 772, 24 Ky. L. Rep. 2200.

*As to when the relation terminates generally, see supra*, §§ 137-142.

<sup>18</sup> *Pease v. Dibble*, 57 Ga. 446; *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006; *McMahon v. Bardinger*, (Pa.) 4 Atl. 379.

*As to ratification generally, see infra*, §§ 211-214.

<sup>19</sup> *Thompson v. Beacon Val. Rubber Co.*, 56 Conn. 493, 16 Atl. 554.

ty to another, so as to confer on such other his own rights, duties, and obligations; nor can he, without his client's consent, employ other counsel or assistants at the client's expense,<sup>20</sup> even though

<sup>20</sup> *United States*.—*Wilkinson v. Tilden*, 14 Fed. 778.

*Alabama*.—*Hitchcock v. McGehee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249; *King v. Pope*, 28 Ala. 601.

*Arkansas*.—*Kellogg v. Norris*, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95.

*California*.—*Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899.

*Colorado*.—*Emblem v. Bicksler*, 34 Colo. 496, 83 Pac. 636; *McCarthy v. Crump*, 17 Colo. App. 110, 67 Pac. 343; *Lathrop v. Hallett*, 20 Colo. App. 207, 77 Pac. 1095.

*Florida*.—*Hendry v. Benlisa*, 37 Fla. 609, 20 So. 800, 34 L.R.A. 283.

*Illinois*.—*Cornelius v. Wash*, Breese 98, 12 Am. Dec. 145; *Morgan v. Roberts*, 38 Ill. 85; *Chicago, etc., Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29; *Continental Adjustment Co. v. Hoffman*, 123 Ill. App. 69.

*Indiana*.—*Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

*Iowa*.—*Smalley v. Greene*, 52 Ia. 241, 3 N. W. 78, 35 Am. Rep. 267; *Antrobus v. Sherman*, 65 Ia. 230, 21 N. W. 579, 54 Am. Rep. 7; *Gilliland v. Brantner*, 145 Ia. 275, 121 N. W. 1047.

*Kansas*.—*Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886.

*Minnesota*.—*Brewer v. Hartman*, 116 Minn. 512, 134 N. W. 113.

*Mississippi*.—*Dickson v. Wright*, 52 Miss. 588, 24 Am. Rep. 677.

*Missouri*.—*Callahan v. Shotwell*, 60 Mo. 398; *Cross v. Atchison*, T., etc.,

R. Co., 141 Mo. 132, 42 S. W. 675; *McDonough v. Daly*, 3 Mo. App. 606; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93.

*Nebraska*.—*McDowell v. Gregory*, 14 Neb. 33, 14 N. W. 899; *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3. *Compare* *Dillon v. Watson*, 3 Neb. (unofficial) Rep. 530, 92 N. W. 156 (set out below).

*New Mexico*.—*Johnston v. Baca*, 13 N. M. 338, 85 Pac. 237.

*New York*.—*Matter of Bleakley*, 5 Paige 311; *Buckley v. Buckley*, 64 Hun 632 mem., 18 N. Y. S. 607; *Lacher v. Gordon*, 127 App. Div. 140, 111 N. Y. S. 283; *Meaney v. Rosenberg*, 32 Misc. 96, 65 N. Y. S. 497, *reversing* 28 Misc. 520, 59 N. Y. S. 582.

*North Dakota*.—*Riebold v. Hartzell*, 23 N. D. 264, 136 N. W. 247.

*Ohio*.—*Knight v. Buser*, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28.

*Texas*.—*Ratcliff v. Baird*, 14 Tex. 43; *Missouri, K. & T. R. Co. v. Wright*, 47 Tex. Civ. App. 458, 107 S. W. 77.

*Vermont*.—*Briggs v. Georgia*, 10 Vt. 68.

*West Virginia*.—*Ellis v. Heptinstall*, 8 W. Va. 388; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

*Appearance in Name of Another Attorney*.—Where an attorney who was also a defendant, and authorized to appear for his codefendant, had the appearance entered in the name of another attorney, there was no delegation of discretion or authority, and having conducted the case himself, that he did so in the name of another

he, himself, becomes disqualified to act;<sup>1</sup> nor can he transfer to another attorney his own executory agreement to render professional services.<sup>2</sup> Thus, an attorney cannot delegate his authority to submit his client's case to arbitration,<sup>3</sup> or to collect a claim,<sup>4</sup> or to receive for his client the amount due on a judgment.<sup>5</sup> The rule rests not only on the principle of *delegatus non delegare potest*, but also on the presumption that the client, in selecting a

attorney is a difference of form and not of substance. *Swartz v. Morgan*, 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786.

*Compare Reich v. Cochran*, 102 N. Y. S. 827, affirmed 139 App. Div. 931, 124 N. Y. S. 1127, 105 App. Div. 542, 94 N. Y. S. 404, wherein it was held that one attorney has authority to empower another to appear for the client.

In *Dillon v. Watson*, 3 Neb. (unofficial) Rep. 530, 92 N. W. 156, it was held that an attorney, retained to conduct a case pending in another county, may properly employ local counsel to attend to formal matters.

<sup>1</sup> An attorney at law, elected a judge, cannot substitute another to perform his subsisting professional contracts. *Ratcliff v. Baird*, 14 Tex. 43.

<sup>2</sup> *Johnston v. Baca*, 13 N. M. 338, 85 Pac. 237.

A contract whereby the owner of land gives a lawyer the option of buying it at a certain price, in consideration of the latter taking all legal steps to perfect the title, cannot be enforced by the assignee of the lawyer, since an executory contract for personal services requiring skill is not assignable. *Sloan v. Williams*, 138 Ill. 43, 27 N. E. 531, 12 L.R.A. 496.

Where a contract for professional services is made by an attorney, and land is conveyed to him as a condi-

tional fee for the prosecution of a certain action on behalf of the client, the contract is personal and confidential, and cannot be assigned to another without the assent of the client; and, in case of assignment without such assent, the client may declare the contract at an end, and recover the lands conveyed as a conditional fee; the money expended in the prosecution of the action, however, to be refunded. *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3.

<sup>3</sup> *Wright v. Evans*, 53 Ala. 103.

<sup>4</sup> *Kellogg v. Norris*, 10 Ark. 18; *Danley v. Crawl*, 28 Ark. 95; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677.

*Compare McEwen v. Mazyck*, 3 Rich. L. (S. C.) 210, wherein it was held that an attorney may employ an agent to receive money for him in his professional business.

In *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360, it was held that an attorney, in whose hands a debt has been placed for collection, may place such claim in the hands of other attorneys for the purpose of bringing suit, where to attend personally to the case is impracticable or inconvenient for the original attorney.

<sup>5</sup> *Missouri, K. & T. R. Co. v. Wright*, 47 Tex. Civ. App. 458, 107 S. W. 77.

particular person, desired his personal services.<sup>6</sup> But an attorney retained to conduct a case which is pending in another county may properly employ local counsel to attend to necessary formal matters, such as procuring orders, attending calls of the docket, and the like, and charge the fees paid such counsel as expenses, where it appears that the fees paid were less, or at least not more, than the expense which would have been incurred had he gone in person.<sup>7</sup> And he may delegate to clerks and employees such duties as do not involve peculiar skill or discretion.<sup>8</sup> The client may, of course, consent to the employment of associate counsel,<sup>9</sup> and such consent may be inferred from the circumstances;<sup>10</sup> but it cannot be established by the attorney's declarations as against

<sup>6</sup> *Smalley v. Greene*, 52 Ia. 241, 3 N. W. 78, 35 Am. Rep. 267; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677.

<sup>7</sup> *Dillon v. Watson*, (Neb.) 92 N. W. 156.

<sup>8</sup> No clerk of an attorney at law may discontinue an action without the consent of his principal. *Irvine v. Spring*, 7 Robt. (N. Y.) 293, 35 How. Pr. 479.

An affidavit in support of a motion to punish a judgment debtor for contempt cannot be made by the managing clerk of the attorney of the judgment creditor, unless expressly authorized to do so, and reason is shown why it is not made by the judgment creditor or his attorney. *Eyre v. Stubbert*, 71 Misc. 147, 128 N. Y. S. 4.

An attorney's clerk, however extensive his general powers may be, cannot discontinue an action without the consent of his principal. *Irvine v. Spring*, 7 Robt. (N. Y.) 293. Nor can such a clerk bind the attorney's client by a discharge, without satisfaction, of a debt due the client. *Carter v. Talcott*, 10 Vt. 471.

<sup>9</sup> *Dentzel v. City & Suburban R.*

*Co.*, 90 Md. 434, 45 Atl. 201; *Smith v. Lipscomb*, 13 Tex. 532. See also *Gilliland v. Brantner*, 145 Ia. 275, 121 N. W. 1047.

*Revocation of Employment.*—Where a power of attorney authorizes the person appointed to appoint an attorney under him, and to revoke such appointment at his pleasure, the death of the principal attorney necessarily revokes the power of the substitute. *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371.

<sup>10</sup> *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360; *Ellis v. Heptinstall*, 8 W. Va. 388.

In *Dentzel v. City, etc., R. Co.*, 90 Md. 434, 45 Atl. 201, the court said that there can be no doubt that when a party employs an attorney to enforce a claim or procure a settlement, and knows that he will employ another attorney to conduct the transaction with the other party, he cannot be heard to question the right of the third party to make the settlement with him—provided, of course, it is within the scope of the employment of the original attorney.

evidence to the contrary,<sup>11</sup> nor does a contract for the employment of an attorney, which reserves to the client the right to employ assistant counsel, authorize the attorney to employ such assistant at the expense of the client.<sup>12</sup> So, also, an attorney may, at his own expense, employ associate counsel,<sup>13</sup> providing, of course, that such employment is not objected to, or prohibited by his client. It has also been held that the client may be charged with the reasonable value of the services performed, including those rendered by an associate employed by the original attorney.<sup>14</sup> Where an attorney has the management of a suit, and, in this respect, is both agent and attorney for a party, he may employ assistant counsel at the charge of his client.<sup>15</sup> The unauthorized retainer of associate counsel may be ratified by the client so as to be binding on him,<sup>16</sup> and such ratification may be inferred from the acceptance of his services without objection.<sup>17</sup>

### *Ratification of Unauthorized Acts.*

§ 211. **Generally.** — The acts of an attorney in excess of his authority may be ratified by the client,<sup>18</sup> and thereupon they be-

<sup>11</sup> *Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899. See also *In re Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127.

<sup>12</sup> *Gilliland v. Brantner*, 145 Ia. 275, 121 N. W. 1047.

<sup>13</sup> *Villas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

<sup>14</sup> *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Dillon v. Watson*, 3 Neb. (unofficial) Rep. 530, 92 N. W. 156. And see *infra*, §§ 407-409.

<sup>15</sup> *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095; *Briggs v. Georgia*, 10 Vt. 68.

<sup>16</sup> *Dentzel v. City, etc., R. Co.*, 90 Md. 434, 45 Atl. 201; *Clarke v. Gray*, 1 How. Pr. (N. Y.) 128. And as to ratification generally, see *infra*, §§ 211-214.

*Compare O'Conner v. Arnold*, 53 Ind. 203.

<sup>17</sup> *Fenno v. English*, 22 Ark. 170; *Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899; *McDonough v. Daly*, 3 Mo. App. 606; *Rogers v. McKenzie*, 81 N. C. 164; *Smith v. Lipscomb*, 13 Tex. 532; *Jones v. Jones*, 72 Wash. 517, 130 Pac. 1125.

*Compare Gilliland v. Brantner*, 145 Ia. 275, 121 N. W. 1047, wherein it was said that though he knew that assistant counsel rendered certain services, the client was not liable therefor, because he had a right to presume that such services were performed at the attorney's expense. And see to the same effect, *McCarthy v. Crump*, 17 Colo. App. 110, 67 Pac. 343.

<sup>18</sup> *Hughes County v. Ward*, 81 Fed. 314; *Lisbon v. Holton*, 51 N. H. 209.

come as effective as if they were originally authorized.<sup>19</sup> Ratification may be either express or implied,<sup>20</sup> depending on the facts presented by the particular case.<sup>1</sup> So, a client may ratify a part

<sup>19</sup> *United States*.—*Erwin v. Blake*, 8 Pet. 24, 8 U. S. (L. ed.) 853; *Robb v. Roelker*, 66 Fed. 23; *Hughes County v. Ward*, 81 Fed. 314.

*Alabama*.—*Kirk v. Glover*, 5 Stew. & P. 340.

*Arkansas*.—*Whiting v. Beebe*, 12 Ark. 421.

*Colorado*.—*Roberts v. Denver, etc., R. Co.*, 8 Colo. App. 504, 46 Pac. 880.

*Delaware*.—*Wood v. Bangs*, 2 Pen. 435, 48 Atl. 189.

*District of Columbia*.—*Hazleton v. Le Duc*, 10 App. Cas. 379.

*Indiana*.—*Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975.

*Iowa*.—*Ryan v. Doyle*, 31 Iowa 53.

*Kansas*.—*Dresser v. Wood*, 15 Kan. 344.

*Louisiana*.—*Camors v. Losch, Mann*. Unrep. Cas. 95.

*Maine*.—*Vose v. Treat*, 58 Me. 378.

*Massachusetts*.—*Fisher v. Willard*, 13 Mass. 379; *Peru Steel, etc., Co. v. Whipple File, etc., Co.*, 109 Mass. 484.

*Michigan*.—*Lindner v. Hine*, 84 Mich. 511, 48 N. W. 43.

*Missouri*.—*State v. Harrington*, 100 Mo. 170, 13 S. W. 398; *Hays v. Merkle*, 70 Mo. App. 509; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042.

*Nebraska*.—*Fenimore v. White*, 78 Neb. 520, 111 N. W. 204.

*New York*.—*Patterson v. McGovern*, 44 App. Div. 310, 60 N. Y. S. 714; *Chautauqua County Bank v. Risley*, 4 Den. 480; *Lockner v. Holland*, 81 N. Y. S. 730.

*North Carolina*.—*Moye v. Cogdell*, 69 N. C. 93; *Christian v. Yarborough*, 124 N. C. 72, 32 S. E. 383.

*North Dakota*.—*Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L.R.A. (N.S.) 244; *Van Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609.

*Ohio*.—*Julier v. Julier*, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

*Pennsylvania*.—*Himes v. Herr*, 3 Pa. Super. Ct. 124.

*Tennessee*.—*Smith v. Quarles*, 46 S. W. 1035.

*Texas*.—*Cook v. Greenberg*, 34 S. W. 689.

*Virginia*.—*Herrell v. Prince William County*, 113 Va. 594, 75 S. E. 87.

*Washington*.—*Denney v. Parker*, 10 Wash. 218, 38 Pac. 1018; *Lambert v. Gillette*, 24 Wash. 726, 64 Pac. 784; *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121; *State v. Spokane*, 44 Wash. 688, 87 Pac. 944.

<sup>20</sup> *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006.

<sup>1</sup> *California*.—*Ephraim v. Pacific Bank*, 149 Cal. 222, 86 Pac. 507.

*Illinois*.—*Cameron v. Stratton*, 14 Ill. App. 270.

*Louisiana*.—*Taylor v. Sutton*, 6 La. Ann. 700; *Mason v. Stewart*, 6 La. Ann. 736; *Brooks v. Poirier*, 10 La. Ann. 512.

*Maine*.—*Narraguagus Land Proprietors v. Wentworth*, 36 Me. 339.

*Michigan*.—*Gemberling v. Spaulding*, 104 Mich. 217, 62 N. W. 342.

*New York*.—*Bradt v. Scott*, 63 Hun 632 mem., 18 N. Y. S. 507.

*Wisconsin*.—*Hooker v. Brandon*, 75 Wis. 8, 43 N. W. 741.

only of the unauthorized acts of his attorney; thus he may ratify the act of his attorney by accepting a bond in payment of a judgment recovered by him, but he does not thereby necessarily ratify a subsequent unauthorized transfer of the bond by the attorney to his own use.<sup>2</sup> And where an attorney received a note from the execution debtor under an agreement that the debtor might run the execution against his codefendant, the client may ratify the reception of the note, and repudiate the agreement as to the running of the execution.<sup>3</sup> The client may ratify every act which he could have originally authorized his attorney to perform; thus as to the unauthorized institution of legal proceedings,<sup>4</sup> acceptance of service,<sup>5</sup> appearance,<sup>6</sup> employment of associate counsel,<sup>7</sup> agreements with third persons,<sup>8</sup> and the assignment of a judgment,<sup>9</sup> or mortgage.<sup>10</sup> So, also, the client may ratify an unauthorized compromise,<sup>11</sup> release,<sup>12</sup> satisfaction of a judgment,<sup>13</sup> the acceptance of payment of his client's demands otherwise than in money,<sup>14</sup>

<sup>2</sup> *Kirk v. Glover*, 5 Stew. & P. (Ala.) 340.

<sup>3</sup> *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132.

<sup>4</sup> *Hughes County v. Ward*, 81 Fed. 314; *Roberts v. Denver, L. & G. R. Co.*, 8 Colo. App. 504, 46 Pac. 880; *Dresser v. Wood*, 15 Kan. 344; *Lisbon v. Holton*, 51 N. H. 209.

<sup>5</sup> *Clark v. Morrison*, 80 Ga. 393, 6 S. E. 171; *Lorenz v. King*, 38 Pa. St. 93.

<sup>6</sup> *Ryan v. Doyle*, 31 Ia. 53.

<sup>7</sup> *Bradt v. Scott*, 63 Hun 632 mem., 18 N. Y. S. 507; *Rogers v. McKenzie*, 81 N. C. 164.

<sup>8</sup> *Compare Lathrop v. Hallett*, 20 Colo. App. 207, 77 Pac. 1095.

<sup>9</sup> *Ephraim v. Pacific Bank*, 149 Cal. 222, 86 Pac. 507; *Travellers' Ins. Co. v. Patten*, 119 Ind. 416, 20 N. E. 790.

<sup>10</sup> *Marshall v. Moore*, 36 Ill. 321; *Dunn v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127.

<sup>11</sup> *Cutts v. York Mfg. Co.*, 18 Me. 190.

<sup>12</sup> *Wetherbee v. Fitch*, 117 Ill. 67, 7

N. E. 513; *Wakeman v. Jones*, 1 Ind. 517; *Camors v. Losch*, Man. Unrep. Cas. (La.) 95; *Semple v. Atkinson*, 64 Mo. 504; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042; *Van Campen v. Bruns*, 54 App. Div. 86, 66 N. Y. S. 344; *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121; *State v. Spokane*, 44 Wash. 688, 87 Pac. 944.

<sup>13</sup> *Hodgins v. Heaney*, 17 Minn. 45; *Babcock v. United R. Co.*, 158 Mo. App. 275, 138 S. W. 53; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Benedict v. Smith*, 10 Paige (N. Y.) 126; *Christian v. Yarrowborough*, 124 N. C. 72, 32 S. E. 383.

<sup>14</sup> *Himes v. Herr*, 3 Pa. Super. Ct. 124, 39 W. N. C. 568.

<sup>15</sup> *Alabama*.—*Kirk v. Glover*, 5 Stew. & P. 340.

*Colorado*.—*Compare Black v. Drake*, 2 Colo. 330.

*Illinois*.—*Chapman v. Burt*, 77 Ill. 337.

*Louisiana*.—*Beau v. Drew*, 15 La. Ann. 461.



or the taking of less than the full amount due thereon.<sup>15</sup> The burden of establishing a ratification rests with the party who seeks the benefit thereof,<sup>16</sup> and in case of a conflict of evidence the question is one for the jury.<sup>17</sup>

**§ 212. Ratification by Adopting or Accepting Benefits of Attorney's Acts.**—So, although an attorney has acted for another without authority, or has exceeded his authority, his acts will be considered ratified where they are adopted by the party in whose interest they were intended.<sup>18</sup> Ratification of an attorney's unauthorized acts may also be inferred from the acceptance by the client of the benefits thereof with full knowledge of the facts.<sup>19</sup> But such acceptance must be inconsistent with

*Maine.*—Patten v. Fullerton, 27 Me. 58.

*Massachusetts.*—Swett v. Southworth, 125 Mass. 417.

*Minnesota.*—Ruggles v. Swanwick, 6 Minn. 526.

*Mississippi.*—Bower v. Henshaw, 53 Miss. 345.

*Tennessee.*—Baldwin v. Merrill, 8 Humph. 132.

*Washington.*—Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 Pac. 8.

<sup>15</sup> Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120.

<sup>16</sup> Reinhart Grocery Co. v. Powell, 158 Mo. App. 458, 138 S. W. 909; Wiley v. Mahood, 10 W. Va. 206.

<sup>17</sup> Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720, reversing 40 App. Div. 506, 58 N. Y. S. 182.

<sup>18</sup> United States.—Stowe v. U. S., 19 Wall. 13, 22 U. S. (L. ed.) 144; Robb v. Vos, 155 U. S. 13, 15 S. Ct. 4, 39 U. S. (L. ed.) 52.

*Arkansas.*—Byers v. Fowler, 14 Ark. 86; Hines v. Stephens, 90 Ark. 518, 119 S. W. 664.

*District of Columbia.*—Hazleton v. Le Duc, 10 App. Cas. 379.

*Illinois.*—Leahy v. Stone, 115 Ill. App. 138.

*Iowa.*—Ryan v. Doyle, 31 Iowa 53.

*Massachusetts.*—Savage v. Blanchard, 148 Mass. 348, 19 N. E. 396.

*Minnesota.*—Ruggles v. Swanwick, 6 Minn. 526.

*Mississippi.*—Bower v. Henshaw, 53 Miss. 345.

*Missouri.*—State v. Harrington, 100 Mo. 170, 13 S. W. 398.

*Pennsylvania.*—Bowman v. Bowman, 1 Pears. 465.

The payment by a client of part of a judgment rendered against him, amounts to a ratification of unauthorized acts of his attorney through which the judgment was obtained. Hefferman v. Burt, 7 Iowa 320, 71 Am. Dec. 445.

<sup>19</sup> United States.—Rader v. Maddox, 150 U. S. 128, 14 S. Ct. 46, 37 U. S. (L. ed.) 1025, reversing 9 Mont. 126, 22 Pac. 386.

*Alabama.*—Kirk v. Glover, 5 Stew. & P. 340; Florence Cotton & Iron Co.

any other reasonable hypothesis than that of approval of the attorney's acts.<sup>20</sup> Thus the compulsory acceptance of such benefits under an order of court, does not preclude the client from thereafter asserting his rights and disregarding an alleged compromise.<sup>1</sup> Nor does the mere attempt to take advantage of the transaction amount to a ratification where the client fails to realize thereon.<sup>2</sup> Thus a client cannot be deemed to have ratified a payment by reason of having demanded the money of the attorney, upon hear-

*r. Louisville Banking Co.*, 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50.

*Arkansas*.—*Ford v. Bigger*, 80 Ark. 300, 97 S. W. 65.

*Illinois*.—*Marshall v. Moore*, 36 Ill. 321; *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513.

*Indiana*.—*Travellers' Ins. Co. v. Patten*, 119 Ind. 416, 20 N. E. 790; *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441.

*Kentucky*.—*Sebastian v. Rose*, 135 Ky. 197, 122 S. W. 120.

*Louisiana*.—*Beau v. Drew*, 15 La. Ann. 461; *Maraist v. Caillier*, 30 La. Ann. 1087; *Culverhouse v. Marx*, 39 La. Ann. 809, 2 So. 607.

*Maine*.—*Patten v. Fullerton*, 27 Me. 58; *Vose v. Treat*, 58 Me. 378.

*Massachusetts*.—*Herring v. Polley*, 8 Mass. 113; *Pratt v. Putnam*, 13 Mass. 361. And see *Fisher v. Willard*, 13 Mass. 379.

*Michigan*.—*Lindner v. Hine*, 84 Mich. 511, 48 N. W. 43.

*Minnesota*.—*Compare Burgraf v. Byrnes*, 94 Minn. 418, 103 N. W. 215.

*Missouri*.—*Semple v. Atkinson*, 64 Mo. 504; *Babcock v. United R. Co.*, 158 Mo. App. 275, 138 S. W. 53.

*New Jersey*.—*Tooker v. Sloan*, 30 N. J. Eq. 394.

*New York*.—*Benedict v. Smith*, 10 Paige 126; *Ives v. Ives*, 80 Hun 136, 29 N. Y. S. 1033; *Patterson v. Mc-*

*Govern*, 44 App. Div. 310, 60 N. Y. S. 714; *Chadwick v. Manning*, 7 N. Y. S. 623.

*North Carolina*.—*Christian v. Yarbrough*, 124 N. C. 72, 32 S. E. 383.

*Ohio*.—*Julier v. Julier*, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697; *Dunn v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127.

*Washington*.—*Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121; *State v. Spokane*, 44 Wash. 688, 87 Pac. 944.

<sup>20</sup> *Batesville Bank v. Maxey*, 76 Ark. 472, 88 S. W. 968; *Bassford v. Swift*, 17 Misc. 149, 39 N. Y. S. 337; *Carter v. Roland*, 53 Tex. 540; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

<sup>1</sup> *Timm v. Timm*, 34 Wash. 228, 75 Pac. 879.

<sup>2</sup> *Davis v. Severance*, 49 Minn. 528, 52 N. W. 140.

A creditor does not affirm his attorney's act, in taking bonds from the debtor, by prosecuting a suit at his own expense on the bonds, if he does not realize his debt. *Wilkinson v. Holloway*, 7 Leigh (Va.) 277.

But see *Memphis St. R. Co. v. Roe*, 118 Tenn. 601, 102 S. W. 343, wherein it was held that where the plaintiff's attorney settles with the defendant without authority from his client and

ing that he had it;<sup>3</sup> nor does a client ratify an unauthorized payment, at the direction of his attorney, of a judgment debt to a third person, by undertaking, by a draft on such person, to obtain the money.<sup>4</sup>

§ 213. **Ratification by Failing to Object.**—A client cannot sit idly by and, with full knowledge of the facts, allow an attorney to act for him, take the chances of satisfactory results, and then deny the attorney's authority. In such cases the failure to object will be deemed a sufficient ratification of the attorney's acts.<sup>5</sup> But the mere failure expressly to disavow the acts of an attorney will not, in itself, be a conclusive ratification thereof;<sup>6</sup> thus it has been held that knowledge by a client that his attorney is being assisted by associate counsel, is not enough to show that the client ratifies the employment, on his behalf, by his counsel of such attorney; such assistance being consistent with the employment of the attorney to assist the counsel at the latter's expense;<sup>7</sup> but such employment would be ratified if the client had reason to

embezzles the proceeds of the settlement, the appearance of the client as prosecutor in a criminal proceeding against the attorney for embezzlement constitutes a ratification of the settlement, and hence the client cannot thereafter recover in an action against the original defendant.

<sup>3</sup> *Humphrey v. Thorp*, 89 Fed. 66; *Cameron v. Stratton*, 14 Ill. App. 270.

<sup>4</sup> *Missouri, K. & T. R. Co. v. Wright*, 47 Tex. Civ. App. 458, 107 S. W. 77.

<sup>5</sup> *Alabama*.—*Hitchcock v. McGehee*, 7 Port. 556.

*California*.—*Pacific Pav. Co. v. Vizech*, 2 Cal. App. 515, 83 Pac. 459.

*Indiana*.—*Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006; *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975.

*Kansas*.—*Rasure v. McGrath*, 23 Kan. 598.

*Michigan*.—*Hirsh v. Fisher*, 138 Mich. 95, 101 N. W. 48.

*New York*.—*Lockner v. Holland*, 81 N. Y. S. 730.

*North Carolina*.—*Rogers v. McKenzie*, 81 N. C. 164.

*North Dakota*.—*Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L.R.A. (N.S.) 244; *Van Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609.

*Pennsylvania*.—*Bingham v. Guthrie*, 19 Pa. St. 418.

*Tennessee*.—*Smith v. Quarles*, 46 S. W. 1035.

*Washington*.—*Lambert v. Gillette*, 24 Wash. 726, 64 Pac. 784.

*West Virginia*.—*Teter v. Irwin*, 69 W. Va. 200, Ann. Cas. 1913A 707, 71 S. E. 115.

<sup>6</sup> *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

<sup>7</sup> *Lathrop v. Hallett*, 20 Colo. App. 207, 77 Pac. 1095.

know that it was meant to be at his expense, and permitted it to continue without objection.<sup>8</sup>

§ 214. **Laches as Ratification.**—Laches on the part of a client who has knowledge of the facts, will also be deemed a ratification of an attorney's unauthorized acts.<sup>9</sup> There can be no ratification, however, on the ground of laches until the client has knowledge of the facts;<sup>10</sup> but when he has acquired such knowl-

<sup>8</sup> See *supra*, § 212.

<sup>9</sup> *United States*.—*Mayer v. Foulkrod*, 4 Wash. 503, 16 Fed. Cas. No. 9,342.

*Alabama*.—*Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

*Indiana*.—*Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006.

*Iowa*.—See *Reid v. Dickinson*, 37 Iowa 56.

*Kentucky*.—*Loughbridge v. Burkhardt*, 147 Ky. 457, 144 S. W. 65.

*Louisiana*.—*Brooks v. Poirier*, 10 La. Ann. 512.

*Massachusetts*.—*Swett v. Southworth*, 125 Mass. 417.

*Michigan*.—See *Webber v. Barry*, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466.

*Mississippi*.—*Anketell v. Torrey*, 7 Smedes & M. 467.

*New Jersey*.—*Patterson v. Read*, 43 N. J. Eq. 18, 10 Atl. 807.

*New York*.—*Chautauqua County Bank v. Risley*, 4 Denio 480; *Finlay v. Heyward*, 35 Misc. 266, 71 N. Y. S. 779, reversing 34 Misc. 318, 69 N. Y. S. 648.

*Pennsylvania*.—*Filby v. Miller*, 25 Pa. St. 264.

*Virginia*.—*Johnson v. Gibbons*, 27 Grat. 632.

<sup>10</sup> *United States*.—*Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No.

17,733; *U. S. v. Beebe*, 180 U. S. 343, 21 S. Ct. 371, 45 U. S. (L. ed.) 563; *Harper v. National L. Ins. Co.*, 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505.

*Alabama*.—*Hitchcock v. McGehee*, 7 Port. 556.

*Illinois*.—*Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534, 107 Ill. App. 47.

*Indiana*.—*Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

*Iowa*.—*Gilliland v. Brantner*, 145 Ia. 275, 121 N. W. 1047.

*Maryland*.—*Horsey v. Chew*, 65 Md. 555, 5 Atl. 466.

*Mississippi*.—*Garvin v. Lowry*, 7 Smedes & M. 24.

*Missouri*.—*Wonderly v. Martin*, 69 Mo. App. 84.

*Nebraska*.—*Cram v. Sickel*, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

*Wisconsin*.—*Kelly v. Wright*, 65 Wis. 236, 26 N. W. 610; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

An entry of a discontinuance is sufficient to put a plaintiff on inquiry, so that he will be held to have ratified the unauthorized act of his attorney in making the same by acquiescence, though his attorney never gave him any actual notice of such discontinuance. *Filby v. Miller*, 25 Pa. St. 264.

edge he should act promptly.<sup>11</sup> The question whether the client disavowed the act of his attorney within a reasonable time after notice, is one for the court.<sup>12</sup> Laches has been discussed heretofore in other connections of similar import.<sup>13</sup>

<sup>11</sup> *Dorman v. Arkin*, 120 N. Y. S. 757.

In *Lasley v. Lackey*, 4 Ky. L. Rep. 896, it was said: "The execution plaintiff having disapproved of the action of his attorney in bidding for him when notified of it, the fact that he waited three years before instituting suit to set aside the sale, and in the meantime collected the remainder of his execution after his attorney's bid had been subtracted therefrom by the officer making the return, does not constitute an estoppel."

But see *Fenimore v. White*, 78 Neb. 520, 111 N. W. 204, wherein it was held that where the plaintiff's at-

torney received a certain sum in full satisfaction of a claim for use and occupation against the defendant, and it was paid over to the landlord, who did not object thereto until a month after he received the money, and never returned or offered to return it, any unauthorized act of the attorney was ratified.

<sup>12</sup> *Harper v. National L. Ins. Co.*, 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505.

Twenty days' delay after unauthorized compromise held not a ratification. *Jennings v. South Whitley Hoop Co.*, (Ind.) 98 N. E. 194.

<sup>13</sup> See *supra*, §§ 163, 173.

## CHAPTER XI.

### AUTHORITY TO COMPROMISE OR RELEASE.

#### *Compromise Unauthorized by Client.*

- § 215. General Rule.
- 216. Application of Rule.
- 217. In Massachusetts, New Hampshire, and South Carolina.
- 218. In Emergencies.
- 219. Acceptance of Payment Otherwise than in Money.
- 220. Accepting Less than Amount Due.
- 221. Effect of Unauthorized Compromise.
- 222. When Set Aside.
- 223. Rule in Canada.
- 224. Rule in England.

#### *Compromise Authorized by Client.*

- 225. Operation and Extent of Authority.
- 226. Sufficiency of Authority.

#### *Release.*

- 227. Generally.
- 228. Release of Attached Property.

#### *Compromise Unauthorized by Client.*

§ 215. **General Rule.** — While counsel has the undoubted right, and it is his duty, to advise his client to accept an advantageous compromise, provided he neither makes, nor causes to be made, any false statement of fact to induce such compromise by the adverse party,<sup>1</sup> he has not, without authority from his client, the power to compromise a cause of action, either pending or to

<sup>1</sup> *Bunel v. O'Day*, 125 Fed. 303.

be instituted, in which he has been retained as counsel.<sup>2</sup> The power of an attorney is not co-equal with, co-extensive with, or

<sup>2</sup> *United States*.—*Holker v. Parker*, 7 Cranch 436, 3 U. S. (L. ed.) 396; *Pierce v. Brown*, 8 Biss. 534, 19 Fed. Cas. No. 11,143; *Abbe v. Rood*, 6 McLean 106, 1 Fed. Cas. No. 6; *Bates v. Seabury*, 1 Sprague 433, 2 Fed. Cas. No. 1,104; *U. S. v. Beebe*, 180 U. S. 343, 21 S. Ct. 371, 45 U. S. (L. ed.) 563; *Harper v. National L. Ins. Co.*, 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505; *Humphrey v. Thorp*, 89 Fed. 66; *Miocene Ditch Co. v. Moore*, 150 Fed. 483, 80 C. C. A. 301.

*Alabama*.—*Gullett v. Lewis*, 3 Stew. 23; *Robinson v. Murphy*, 69 Ala. 543; *Hall Safe, etc., Co. v. Harwell*, 88 Ala. 441, 6 So. 750; *Senn v. Joseph*, 106 Ala. 454, 17 So. 543.

*Arkansas*.—*Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Cullin-McCurdy Constr. Co. v. Vulcan Iron Works*, 93 Ark. 342, 124 S. W. 1023.

*California*.—*Preston r. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Ambrose v. McDonald*, 53 Cal. 28; *Trope v. Kerns*, 83 Cal. 553, 23 Pac. 691.

*Colorado*.—*Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568; *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227.

*Connecticut*.—*Derwort v. Loomer*, 21 Conn. 245.

*Delaware*.—*Wood v. Bangs*, 2 Penn. 435, 48 Atl. 189. *Compare* *Strattner v. Wilmington City Electric Co.*, 3 Penn. 453, 53 Atl. 436.

*Georgia*.—*Phillips v. Dobbins*, 56 Ga. 617; *McIntyre v. Meldrim*, 63 Ga. 58; *Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430; *Sonnebom v. Moore*, 105 Ga. 497, 30 S. E. 947; *Kaiser*

*v. Hancock*, 106 Ga. 217, 32 S. E. 123.

*Illinois*.—*Nolan v. Jackson*, 16 Ill. 272; *Wadhams v. Gay*, 73 Ill. 415; *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513; *McClintock v. Helberg*, 168 Ill. 384, 48 N. E. 145; *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534, *affirming* 107 Ill. App. 47; *Schroeder v. Wolf*, 227 Ill. 133, 81 N. E. 13, *affirming* 127 Ill. App. 506; *Miller v. Lane*, 13 Ill. App. 648; *Helper v. Spinner*, 147 Ill. App. 448; *Schreiber v. Straus*, 147 Ill. App. 581.

*Indiana*.—*Miller v. Edmonston*, 8 Blackf. 291; *Wakeman v. Jones*, 1 Ind. 517; *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441; *Jennings v. Whiteley Hoop Co.*, 98 N. E. 194.

*Iowa*.—*Stuck v. Reese*, 15 Ia. 122; *Bigler v. Toy*, 68 Ia. 687, 28 N. W. 17; *Martin v. Capital Ins. Co.*, 85 Ia. 643, 52 N. W. 534; *Rhutasel v. Rule*, 97 Ia. 20, 65 N. W. 1013; *Kilmer v. Gallaher*, 112 Ia. 583, 84 N. W. 697, 84 Am. St. Rep. 358. *Compare* *Potter v. Parsons*, 14 Ia. 286.

*Kansas*.—*Jones v. Inness*, 32 Kan. 177, 4 Pac. 95; *Solomon R. Co. v. Jones*, 34 Kan. 458, 8 Pac. 730; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364.

*Kentucky*.—*Smith v. Dixon*, 3 Metc. 438; *Heath v. Com.* 129 Ky. 835, 113 S. W. 69; *Sebastian v. Rose*, 135 Ky. 197, 122 S. W. 120; *Hall v. Wright*, 137 Ky. 39, 127 S. W. 516; *Loughridge v. Burkhart*, 147 Ky. 457, 144 S. W. 65; *O'Reiley v. Call*, 7 Ky. L. Rep. 516; *Lexington, etc., Min. Co. v. Welburn*, 11 Ky. L. Rep. 307; *Brown v. Bunger*, 43 S. W. 714, 19

equivalent to that of the client. He is a special agent, limited in duty and authority to the vigilant prosecution or defense of his

Ky. L. Rep. 1527; *Cox v. Adelsdorf*, 51 S. W. 616; *Benedict v. Wilhoite*, 80 S. W. 1155; *Sebree v. Sebree*, 99 S. W. 282; *National Bank of Commerce v. Bowman*, 100 S. W. 831.

*Louisiana*.—*Dupre v. Splane*, 16 La. 51; *Phelps v. Preston*, 9 La. Ann. 488; *Landry's Succession*, 117 La. 193, 41 So. 490.

*Maine*.—*Jenney v. Delesdernier*, 20 Me. 183; *Pomeroy v. Prescott*, 106 Me. 401, 21 Ann. Cas. 574, 76 Atl. 898, 138 Am. St. Rep. 347.

*Maryland*.—*Doub v. Barnes*, 4 Gill 1; *Doub v. Barnes*, 1 Md. Ch. 127; *Maddux v. Bevan*, 39 Md. 485; *Rohr v. Anderson*, 51 Md. 205; *Hamburger v. Paul*, 51 Md. 219; *Fritchey v. Bosley*, 56 Md. 94; *Horsev. v. Chew*, 65 Md. 555, 5 Atl. 466; *Real Estate Trust Co. v. Union Trust Co.*, 102 Md. 41, 61 Atl. 228.

*Michigan*.—*Eaton v. Knowles*, 61 Mich. 625, 28 N. W. 740; *Fetz v. Leyendecker*, 157 Mich. 355, 122 N. W. 100.

*Minnesota*.—*Davis v. Severance*, 49 Minn. 528, 52 N. W. 140; *Burgraf v. Byrnes*, 94 Minn. 418, 103 N. W. 215; *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523.

*Mississippi*.—*Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86; *Levy v. Brown*, 56 Miss. 83; *Parker v. McBee*, 61 Miss. 134; *Rice v. Troup*, 62 Miss. 186.

*Missouri*.—*Davidson v. Rozier*, 23 Mo. 387; *Walden v. Bolton*, 55 Mo. 405; *Spears v. Ledergerber*, 56 Mo. 465; *Semple v. Atkinson*, 64 Mo. 504; *Black v. Rogers*, 75 Mo. 441;

*Melcher v. Jefferson City Exchange Bank*, 85 Mo. 362; *State v. Clifford*, 124 Mo. 492, 28 S. W. 5; *Roberts v. Nelson*, 22 Mo. App. 28; *Lewis v. Baker*, 24 Mo. App. 682; *Williard v. A. Siegel Gas-Fixture Co.*, 47 Mo. App. 1; *Barton v. Hunter*, 59 Mo. App. 610; *Bay v. Trusdell*, 92 Mo. App. 377; *Schlemmer v. Schlemmer*, 107 Mo. App. 487, 81 S. W. 636; *Kelly v. Chicago, etc., R. Co.*, 113 Mo. App. 468, 87 S. W. 583. See also *Grumley v. Webb*, 48 Mo. 562.

*Montana*.—*Harris v. Root*, 28 Mont. 168, 72 Pac. 429.

*Nebraska*.—*Hamrick v. Combs*, 14 Neb. 381, 15 N. W. 731; *Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519.

*New Jersey*.—*Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222; *Faughnan v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212; *Watts v. Frenche*, 19 N. J. Eq. 407; *Dickerson v. Hodges*, 43 N. J. Eq. 46, 10 Atl. 111.

*New York*.—*Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Beers v. Hendrickson*, 45 N. Y. 665, *modifying* 6 Robt. 53; *Cox v. New York Cent., etc., R. Co.*, 63 N. Y. 414; *Mandeville v. Reynolds*, 68 N. Y. 528, *affirming* 5 Hun 338; *Lewis v. Duane*, 141 N. Y. 302, 36 N. E. 322, *affirming* 69 Hun 28, 23 N. Y. S. 433; *Bush v. O'Brien*, 164 N. Y. 210, 58 N. E. 106; *Shaw v. Kidder*, 2 How. Pr. 243; *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. S. 1002, *affirmed* 31 App. Div. 98, 52 N. Y. S. 527; *Matter of Neufeld*, 50 Misc. 215, 100 N. Y. S. 444; *Woodford v. Rasbach*, 6 Civ. Pro. 315, *appeal dismissed* 99 N. Y. 659;



client's rights. He can enter into no bargains or contracts which will bind his client, unless the client has specially authorized or subsequently ratified them. All who deal with an attorney must ascertain the extent of his authority; and if they do not inquire, they can claim no protection because they indulged suppositions or conjectures, reasonable or unreasonable, that he had the au-

*McKechnie v. McKechnie*, 3 App. Div. 91, 39 N. Y. S. 402; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417; *Matter of Amsterdam Ave.*, 112 App. Div. 160, 98 N. Y. S. 331.

*North Carolina*.—*Moye v. Cogdell*, 69 N. C. 93.

*Ohio*.—*Holden v. Lippert*, 4 Ohio Cir. Dec. 527; *Countee v. Armstrong*, 9 Ohio Dec. (Reprint) 62, 10 Cinc. L. Bul. 339.

*Oklahoma*.—*Turner v. Fleming*, 130 Pac. 551.

*Oregon*.—*Fleishman v. Meyer*, 46 Ore. 267, 80 Pac. 209.

*Pennsylvania*.—*Huston v. Mitchell*, 14 S. & R. 307, 16 Am. Dec. 506; *Dodds v. Dodds*, 9 Pa. St. 315; *Filby v. Miller*, 25 Pa. St. 264; *Stokely v. Robinson*, 34 Pa. St. 315; *Housenick v. Miller*, 93 Pa. St. 514; *Mackey v. Adair*, 99 Pa. St. 143; *North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361, 12 W. N. C. 177; *Isaacs v. Zugsmith*, 103 Pa. St. 77; *Brockley v. Brockley*, 122 Pa. St. 1, 15 Atl. 646; *Johnstown, etc., R. Co. v. Egbert*, 152 Pa. St. 53, 25 Atl. 151; *Gray v. Howell*, 205 Pa. St. 211, 54 Atl. 774; *Schroeder v. Gillespie*, 2 Pa. Dist. Ct. 221; *Callahan v. Quigley*, 6 Pa. Dist. Ct. 494; *Ely v. Lamb*, 10 Pa. Co. Ct. 209; *Schuykill River Road*, 20 Pa. Co. Ct. 559.

*Rhode Island*.—*Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42.

*Tennessee*.—*Mathews v. Massey*, 4 Attys. at L. Vol. I.—25.

*Baxt*, 450; *Conley v. Whitthorne*, 58 S. W. 380; *Davis v. Home Ins. Co.*, 155 S. W. 131.

*Texas*.—*Pierrepont v. Sassee*, 1 Tex. App. Civ. Cas. § 1295; *Adams v. Roller*, 35 Tex. 711; *Roller v. Woolbridge*, 46 Tex. 485; *Anderson v. Oldham*, 82 Tex. 231, 18 S. W. 557; *Taylor v. Evans*, 29 S. W. 172; *Cook v. Greenberg*, 34 S. W. 687; *Youngberg v. El Paso Brick Co.*, 155 S. W. 715.

*Vermont*.—*Penniman v. Patchin*, 5 Vt. 346; *Vail v. Conant*, 15 Vt. 314; *Granger v. Batchelder*, 54 Vt. 248, 41 Am. Rep. 846; *Brown v. Mead*, 68 Vt. 215, 34 Atl. 950.

*Virginia*.—*Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780; *Carter v. Cooper*, 111 Va. 602, 69 S. E. 944.

*Washington*.—*Budlong v. Budlong*, 31 Wash. 228, 71 Pac. 751; *Timm v. Timm*, 34 Wash. 228, 75 Pac. 879.

*West Virginia*.—*Wiley v. Mahood*, 10 W. Va. 206; *Crotty v. Eagle*, 35 W. Va. 143, 13 S. E. 59.

*Wisconsin*.—*Kelly v. Wright*, 65 Wis. 236, 26 N. W. 610; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. 1031; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

An attorney, without authority, compromised his client's cause of action after action was brought thereon, and stipulated for a dismissal upon the merits. Thereafter the client, through another attorney, brought a new action upon the same cause, and defendant pleaded in bar

thority he was exercising.<sup>3</sup> An attorney certainly cannot bind his client by any unauthorized act which amounts to a total or partial surrender of a substantial right.<sup>4</sup> In some jurisdictions, however, this rule has been modified by statute.<sup>5</sup> An unauthorized compromise may of course be ratified.<sup>6</sup>

§ 216. Application of Rule. — The foregoing general rule is applicable, not alone to the compromise of the client's cause of

the compromise and settlement, to which plaintiff replied that the settlement was unauthorized, and fraudulently entered into by the attorney. Held, that the validity of the compromise and settlement, the stipulation evidencing the same not having been followed by judgment, was a proper issue in the case, and that the rule against collateral attack did not apply. *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523.

<sup>3</sup> *Robinson v. Murphy*, 69 Ala. 543, following *Gullett v. Lewis*, 3 Stew. (Ala.) 23.

<sup>4</sup> *Pomeroy v. Prescott*, 106 Me. 401, 21 Ann. Cas. 574, 76 Atl. 898, 138 Am. St. Rep. 347. See also *Harbach v. Colvin*, 73 Ia. 638, 35 N. W. 663; *Dickerson v. Hodges*, 43 N. J. Eq. 46, 10 Atl. 111; *Lewis v. Duane*, 141 N. Y. 313, 36 N. E. 322; *Smith v. Lamberts*, 7 Grat. (Va.) 142.

<sup>5</sup> *The Alabama Code* provides that "an attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such cause, made in writing, or by an entry to be made on the minutes of the court." Code of 1907, § 2988. See also *B. F. Roden Grocery Co. v. McAfee*, 160 Ala. 564, 49 So. 402.

*In Maine* it is provided by section 59 of chapter 84 of the Revised Statutes that "no action shall be main-

tained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small." The original statute of 1851 (Acts 1851, c. 213, § 1) was construed and given effect in *Fogg v. Sanborn*, 48 Me. 432. See also *Bonney v. Morrill*, 57 Me. 368.

But in *Pomeroy v. Prescott*, 106 Me. 401, 21 Ann. Cas. 574, 76 Atl. 898, 138 Am. St. Rep. 347, it was held that the statute does not apply where there is no settlement of the demand "in full discharge thereof," or where no valuable consideration is received by the attorney for waiving and releasing part of his client's claim.

*Under the Vermont statute* (R. L., § 1450; V. S., § 1692) authorizing the tender of damages, such tender may be made to the plaintiff's attorney, and may be accepted by him; but the plaintiff, notwithstanding such tender and acceptance of damages, may proceed with his action for the balance of his claim, and his right to do so is not affected by a discontinuance entered by his attorney. *Brown v. Mead*, 68 Vt. 215, 34 Atl. 950.

<sup>6</sup> *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042. And see *supra*, §§ 211-214.

action,<sup>7</sup> but to every other substantial right of the client; thus the attorney cannot in any case, without express authority, accept less than the amount due his client in satisfaction of liens, judgments, or other claims,<sup>8</sup> nor can he accept payment otherwise than in money.<sup>9</sup> The rule also applies to a proctor in admiralty,<sup>10</sup> the attorney for a trustee,<sup>11</sup> and a prosecuting attorney<sup>12</sup> even where the government is a party.<sup>13</sup> So, the rule has been applied to ejectment suits,<sup>14</sup> to the statutory foreclosure of a mortgage,<sup>15</sup> to the collection of notes,<sup>16</sup> and likewise to other claims.<sup>17</sup>

<sup>7</sup> See the cases cited under the preceding section.

<sup>8</sup> See *infra*, § 220.

<sup>9</sup> See *infra*, § 219.

<sup>10</sup> *Bates v. Seabury*, 1 Sprague 433, 2 Fed. Cas. No. 1,104.

<sup>11</sup> The attorney for a trustee cannot contract to waive the rights of the trust estate. Except in the management of the particular action, he has no authority or power to prejudice the substantial rights of the estate, of the trustee or of the *cestui que trust*. *Spaulding v. Allen*, 10 Ohio Cir. Dec. 397, 19 Ohio Cir. Ct. 608.

<sup>12</sup> A prosecuting attorney has no authority, even with the consent of the judge at vacation or in chambers, to release the surety on a forfeited recognizance on the payment to him of his fees and the costs of prosecution. A forfeiture of a recognizance can be remitted only by the court in which the forfeiture is entered "upon cause shown," by its entry of record. *State v. Clifford*, 124 Mo. 492. 28 S. W. 5.

An attorney employed to prosecute an agent on a criminal charge of embezzling funds has no authority to compromise the case. *Harper v. National L. Ins. Co.*, 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505.

<sup>13</sup> The power to compromise a suit

in which the United States is a party does not exist in the district attorney any more than a power to compromise a private suit between individuals rests with the attorney for either party. *U. S. v. Beebe*, 180 U. S. 343, 21 S. Ct. 371, 45 U. S. (L. ed.) 563.

<sup>14</sup> *Dodds v. Dodds*, 9 Pa. St. 315; *Mackey v. Adair*, 99 Pa. St. 143; *Hickey v. Stringer*, 3 Tex. Civ. App. 45, 21 S. W. 716.

An attorney conducting an ejectment suit has no right without the client's authority to enter into a compromise fixing upon a certain line as the boundary line between the tracts of the parties litigant. *Mackey v. Adair*, 99 Pa. St. 143.

<sup>15</sup> *Hirsh v. Beverly*, 125 Ga. 657, 54 S. E. 678; *McKechnie v. McKechnie*, 3 App. Div. 91, 39 N. Y. S. 402.

<sup>16</sup> *Holden v. Lippert*, 4 Ohio Cir. Dec. 527.

An attorney having in his hands certain notes for collection, has no authority to include in a settlement which he makes with a party liable thereon, notes which have not been placed in his hands. *Melcher v. Exchange Bank*, 85 Mo. 362.

<sup>17</sup> Where a debtor makes an assignment for the benefit of creditors, a creditor who does not attend the meetings of the creditors, but is rep-

Nor is the rule any the less effective where the client is a non-resident.<sup>18</sup>

§ 217. In Massachusetts, New Hampshire, and South Carolina. — The general rule, stated above,<sup>19</sup> is applied in these jurisdictions with certain modifications.

In *Massachusetts* it seems that whether, under a general employment, an attorney is authorized, without permission, to compromise his client's claim, either before or after a suit has been brought, is an open question.<sup>20</sup> Thus the general rule is applied to the extent that the attorney cannot accept payment other than in money,<sup>1</sup> nor less than the amount due.<sup>2</sup> So, also, an attorney has no power to settle a cause against the express prohibition of his client; and where such an agreement of settlement is entered of record, the court, if the parties can be put *in statu quo*, may order it stricken from the files.<sup>3</sup> Nor will an executory agreement for the settlement of a suit be enforced in equity where it has not been entered of record,<sup>4</sup> or where it was made by the plaintiff's attorney under a mistake of fact as to his authority.<sup>5</sup>

resented at such meetings by his counsel, is not bound by an agreement entered into by such creditors and the assignee to accept a proposed dividend in full satisfaction of their claims, though it seems that this might be otherwise if the creditor had express notice of a meeting to make a composition, and attended such meeting by attorney. *Isaacs v. Zugsmith*, 103 Pa. St. 77.

<sup>18</sup> *Benedict v. Wilhoite*, 80 S. W. 1155, 26 Ky. L. Rep. 178; *Housenick v. Miller*, 93 Pa. St. 514; *Granger v. Batchelder*, 54 Vt. 248, 41 Am. Rep. 846. Compare *Glass v. Thompson*, 9 B. Mon. (Ky.) 235.

In *Clark v. Kingsland*, 1 Smed. & M. (Miss.) 248, it was held that it is not competent to prove a custom among attorneys to take a full and complete control over the business of foreign clients, and to exercise a dis-

cretionary power in its settlement in violation of the principles of law, or contrary to the interests of such clients.

<sup>19</sup> See *supra*, § 215.

<sup>20</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Anglo-American Land, etc., Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437; *Riley v. Boston El. R. Co.*, 195 Mass. 318, 81 N. E. 197; *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45.

<sup>1</sup> *Langdon v. Potter*, 13 Mass. 319. See also *infra*, § 219.

<sup>2</sup> *Lewis v. Gamage*, 1 Pick. (Mass.) 347. See also *infra*, § 220.

<sup>3</sup> *Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410.

<sup>4</sup> *New York, N. H. & H. R. Co. v. Martin*, 158 Mass. 313, 33 N. E. 578.

<sup>5</sup> *New York, etc., R. Co. v. Martin*, 158 Mass. 313, 33 N. E. 578.

On the other hand, in recognizing the validity of a settlement made under express authority,<sup>6</sup> it has been held that certain restrictions placed upon the attorney's powers in this respect, will not bind an adverse party who was not aware of them.<sup>7</sup> So, an attorney may, before judgment, release an attachment,<sup>8</sup> and generally his authority extends to all acts, in or out of court, necessary or incidental to the prosecution and management of a suit, which affect the remedy only and not the cause of action.<sup>9</sup>

*In New Hampshire*, in the absence of any limitation of the attorney's authority known, or which by reasonable inquiry might be known, to the opposite party, an attorney may by oral or written agreement entered on the record, made under an order of court, and executed by the adversary in good faith, bind his client to a final disposition of the cause. The fact that the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance.<sup>10</sup>

*In South Carolina* an agreement of compromise made in open court is binding on the client;<sup>11</sup> and an agreement made by the attorney during the progress of the case upon a hearing before a master, will be regarded as having been made in open court.<sup>12</sup> One of the principal reasons given for upholding such compromises is because the trial frequently develops a state of facts quite different from that anticipated, and the attorney is compelled to act for the best interests of his client, without the oppor-

<sup>6</sup> *Doon v. Donaher*, 113 Mass. 151. See also *infra*, §§ 225, 226.

<sup>7</sup> *Peru Steel, etc., Co. v. Whipple File, etc., Mfg. Co.*, 109 Mass. 464.

Similar rulings have been made in other jurisdictions, see *infra*, § 225.

<sup>8</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

<sup>9</sup> *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

*In New Hampshire*, in the absence of any limitation of the attorney's authority known, or which by reasonable inquiry might be known, to the opposite party, an attorney may by oral or written agreement entered

on the record, made under an order of court, and executed by the adversary in good faith, bind his client to a final disposition of the cause. The fact that the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance.

<sup>10</sup> *Christie v. Sawyer*, 44 N. H. 298; *Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L.R.A. 167.

<sup>11</sup> *Ex p. Jones*, 47 S. C. 393, 25 S. E. 285.

<sup>12</sup> *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167.

tunity for consultation which would be afforded him on other occasions.<sup>13</sup> But with respect to compromises not made during the trial, the general rule that an attorney has no implied power to compromise has been applied.<sup>14</sup> It has also been held that he cannot accept, as satisfaction, anything but money.<sup>15</sup>

**§ 218. In Emergencies.**—In extraordinary cases, where delay might prove injurious, and there is no opportunity for communication between an attorney and his client, the attorney may compromise a claim without special authority.<sup>16</sup> The necessity creates the authority, and the position of the attorney demands that the authority be exercised for the client's good;<sup>17</sup> but if he has time to communicate the situation to the client without hazarding a loss, he must do so.<sup>18</sup>

**§ 219. Acceptance of Payment Otherwise than in Money.**—The principle that an attorney cannot, without authority from

<sup>13</sup> *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167. See also *infra*, § 218.

<sup>14</sup> *Gilliland v. Gasque*, 6 S. C. 406; *Armstrong v. Hurst*, 39 S. C. 498, 18 S. E. 150; *Hewitt v. Darlington Phosphate Co.*, 43 S. C. 5, 20 S. E. 804. See also the general rule, *supra*, § 215.

<sup>15</sup> *Public Accountant Com'rs. v. Rose*, 1 Desaus. (S. C.) 461; *Treasurers v. McDowell*, 1 Hill L. (S. C.) 184, 26 Am. Dec. 166. See also *infra*, § 219.

<sup>16</sup> *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523. See also *Dolan v. Van Denmark*, 35 Kan. 304, 10 Pac. 848; *Rice v. Wilkins*, 21 Me. 558; *North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361; *Brockley v. Brockley*, 122 Pa. St. 1, 15 Atl. 646.

<sup>17</sup> *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

Where a debt is placed in the hands of attorneys for collection, and the clients are nonresidents, "they must be presumed to have had authority to superintend the collection of the judgment and to make such arrangements with the debtors, or any of them, as they might deem advantageous to their clients." *Glass v. Thompson*, 9 B. Mon. (Ky.) 237.

In *Bates v. Bates*, 66 Minn. 131, 68 N. W. 845, the refusal to set aside a judgment for the plaintiff entered on the agreement of the defendant's counsel was held not to have been erroneous, where it appeared that the defendant resided in another state, and at the time when the case was coming on for trial, of which fact he was probably aware, was absent from his home traveling, so that he did not receive the letters sent him by his counsel.

<sup>18</sup> *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441.

his client, compromise a claim or cause of action,<sup>19</sup> effectively prohibits the acceptance by the attorney of payment otherwise than in money in satisfaction of his client's claims.<sup>20</sup> He may,

<sup>19</sup> See *supra*, § 215.

<sup>20</sup> *United States*.—*Lesher v. Radel*, 170 Fed. 723.

*Alabama*.—*Gullett v. Lewis*, 3 Stew. 23; *Kirk v. Glover*, 5 Stew. & P. 340; *West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Henderson v. Planters' & Merchants' Bank*, 59 So. 493.

*Arkansas*.—*Walker v. Scott*, 13 Ark. 644; *Moore v. Murrell*, 56 Ark. 375, 19 S. W. 973.

*Colorado*.—*Black v. Drake*, 2 Colo. 330; *McMurray v. Marsh*, 12 Colo. App. 95, 54 Pac. 852.

*Georgia*.—*Jeter v. Haviland*, 24 Ga. 252; *McIntyre v. Meldrim*, 63 Ga. 58; *Kaiser v. Hancock*, 100 Ga. 217, 32 S. E. 123; *Bell v. Kwilecki*, 11 Ga. App. 9, 74 S. E. 444.

*Illinois*.—*Nolan v. Jackson*, 16 Ill. 272; *Trumbull v. Nicholson*, 27 Ill. 149; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *McClintock v. Helberg*, 168 Ill. 384, 48 N. E. 145; *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534, 107 Ill. App. 47.

*Indiana*.—*McCormick v. Walter A. Wood Mowing, etc., Mach. Co.*, 72 Ind. 518.

*Iowa*.—*McCarver v. Nealey*, 1 G. Greene 360; *Drain v. Doggett*, 41 Ia. 682; *Bigler v. Toy*, 68 Ia. 687, 28 N. W. 17.

*Kansas*.—*Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261.

*Kentucky*.—*Heath v. Com.*, 120 Ky. 835, 113 S. W. 69; *O'Reiley v. Call*, 7 Ky. L. Rep. 516.

*Louisiana*.—*Woodrow v. Hennen*, 6 Mart. (N. S.) 156; *Perkins v. Grant*,

2 La. Ann. 328; *Phelps v. Preston*, 9 La. Ann. 488; *Railey v. Bagley*, 19 La. Ann. 172; *Garthwaite v. Wentz*, 19 La. Ann. 196; *Davis v. Lee*, 20 La. Ann. 248.

*Maine*.—*Lord v. Burbank*, 18 Me. 178. *Compare* *Fogg v. Sanborn*, 48 Me. 432, decided under the act of 1851 (c. 213, § 1, continued in the revision of 1857, c. 82, § 44).

*Maryland*.—*Maddux v. Bevan*, 39 Md. 485; *Hamburger v. Paul*, 51 Md. 219; *Fritchey v. Bosley*, 56 Md. 94; *Kent v. Ricards*, 3 Md. Ch. 392.

*Michigan*.—*Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61.

*Mississippi*.—*Clark v. Kingsland*, 1 Smed. & M. 248; *Keller v. Scott*, 2 Smed. & M. 81; *Gasquet v. Warren*, 2 Smed. & M. 514; *Gargin v. Lowry*, 7 Smed. & M. 24; *Mangum v. Ball*, 43 Miss. 288, 5 Am. Rep. 488.

*Missouri*.—*Walden v. Bolton*, 55 Mo. 405; *Vanderline v. Smith*, 18 Mo. App. 55.

*Nebraska*.—*Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201; *Hamrick v. Combs*, 14 Neb. 381, 15 N. W. 731; *Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519; *Cram v. Sickel*, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

*New York*.—*Lewis v. Woodruff*, 15 How. Pr. 539; *Finlay v. Heyward*, 35 Misc. 266, 71 N. Y. S. 779, *reversing* 34 Misc. 818, 69 N. Y. S. 648; *Woodford v. Rasbach*, 6 Civ. Pro. 315, *appeal dismissed* 99 N. Y. 659. *Compare* *Livingston v. Radcliff*, 6 Barb. 201, wherein it was held that under a general authority to collect a note

under his general authority, refuse to accept anything in payment of his client's demand except legal tender;<sup>1</sup> thus he need not accept current bank notes which are not legal tender,<sup>2</sup> a custom to the contrary notwithstanding.<sup>3</sup> He cannot accept land or other

an attorney was authorized to receive a payment of part in money, and the residue in a note for two or three days of a person of undoubted responsibility.

*North Carolina*.—*Moye v. Cogdell*, 69 N. C. 93.

*Oregon*.—*Barr v. Rader*, 31 Ore. 225, 49 Pac. 982.

*Pennsylvania*.—*Huston v. Mitchell*, 14 Serg. & R. 307, 16 Am. Dec. 506; *Chambers v. Miller*, 7 Watts 63; *Stackhouse v. O'Hara*, 14 Pa. St. 88; *Whitesell v. Peck*, 165 Pa. St. 571, 30 Atl. 933; *Kissick v. Hunter*, 184 Pa. St. 174, 39 Atl. 83.

*South Dakota*.—*Pioneer Press Co. v. Gossage*, 13 S. D. 624, 84 N. W. 195.

*Tennessee*.—*Kenny v. Hazeltine*, 6 Humph. 63; *Baldwin v. Merrill*, 8 Humph. 139; *Glass v. Davidson*, 1 Baxt. 47; *Davis v. Home Ins. Co.* 155 S. W. 131.

*Texas*.—*Wright v. Daily*, 26 Tex. 730; *Portis v. Ennis*, 27 Tex. 574; *Bradford v. Arnold*, 33 Tex. 412.

*Virginia*.—*Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780; *Wilkinson v. Holloway*, 7 Leigh 277.

*West Virginia*.—*Harper v. Harvey*, 4 W. Va. 539; *Wiley v. Mahood*, 10 W. Va. 206; *Kent v. Chapman*, 18 W. Va. 485.

*Wisconsin*.—*Kelly v. Wright*, 65 Wis. 236, 26 N. W. 610.

<sup>1</sup>*Glass v. Davidson*, 1 Baxt. (Tenn.) 47. See also *Patterson v. Childs*, 9 Ga. App. 646, 72 S. E. 45.

It was held in some early cases

that an attorney had no authority to receive the depreciated paper currency of the Confederacy in payment of his client's claim. *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Railey v. Bagley*, 19 La. Ann. 172; *Garthwaite v. Wentz*, 19 La. Ann. 186; *Davis v. Lee*, 20 La. Ann. 248; *Clark v. Thomas*, 4 Heisk. (Tenn.) 419; *Harper v. Harvey*, 4 W. Va. 539.

<sup>2</sup>*West v. Ball*, 12 Ala. 240; *Trumbull v. Nicholson*, 27 Ill. 149; *Lord v. Burbank*, 18 Me. 178; *Glass v. Davidson*, 1 Baxt. (Tenn.) 47.

<sup>3</sup>A custom among attorneys to accept payment in the depreciated bills of a state bank is invalid. *West v. Ball*, 12 Ala. 340.

In *Lord v. Burbank*, 18 Me. 178, the court said: "However common it may be for persons in receiving payments to waive their strict rights, and to make use of a paper currency, our laws can recognize no such usage as binding upon any person; and when anyone insists upon his legal right to receive gold or silver only in payment, the law will uphold him in the exercise of that right, although it may appear to be an unexpected exercise of it and not in conformity to the accustomed course of transacting business between parties in such relations. The defendant may have had a well-grounded expectation that the common paper currency only would be required of him; but if he would have protected himself against the claim for specie, he



property,<sup>4</sup> or notes,<sup>5</sup> checks,<sup>6</sup> drafts,<sup>7</sup> bonds,<sup>8</sup> county warrants,<sup>9</sup> certificates of indebtedness,<sup>10</sup> mortgages,<sup>11</sup> bills of sale,<sup>12</sup> or an assignment of a judgment.<sup>13</sup> Nor can he, in lieu of his client's demand, substitute his own indebtedness,<sup>14</sup> or the indebtedness of another,<sup>15</sup> even though it is in the form of a note, bond, or other

should have secured in the receipt which he gave for the demand a right to receive and pay it in the usual paper currency."

<sup>4</sup> *Black v. Drake*, 2 Colo. 330; *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61; *Hoopes v. Burnett*, 26 Miss. 428; *Walden v. Bolton*, 55 Mo. 405; *Huston v. Mitchell*, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; *Stackhouse v. O'Hara*, 14 Pa. St. 88; *Gray v. Howell*, 205 Pa. St. 211, 54 Atl. 774.

*Contra in England.*—In compromising, the attorney may accept goods instead of money in satisfaction of his client's claim. *Prestwich v. Poley*, 18 C. B. N. S. 806, 114 E. C. L. 806, 34 L. J. C. Pl. 189, 11 Jur. N. S. 583, 12 L. T. N. S. 390, 13 W. R. 753.

<sup>5</sup> *Jeter v. Haviland*, 24 Ga. 252; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Reinhart Grocery Co. v. Powell*, 158 Mo. App. 458, 138 S. W. 909; *Finlay v. Heyward*, 35 Misc. 266, 71 N. Y. S. 779, *reserving* 34 Misc. 818, 69 N. Y. S. 648; *Heyman v. Beringer*, 1 Abb. N. Cas. (N. Y.) 315.

*Outstanding Note of Client.*—An attorney has no right, without express authority, to accept as part payment outstanding notes of his client held by defendant; and where he does, and satisfies the judgment, the satisfaction will to that extent be set aside on plaintiff's motion and on return of such notes. *Leshner v. Radel*, 170 Fed. 723.

<sup>6</sup> *Chatham Nat. Bank v. Hochstadter*, 27 Alb. L. J. (N. Y.) 133.

<sup>7</sup> *Drain v. Doggett*, 41 Iowa 682; *Moye v. Cogdell*, 69 N. C. 93; *Portis v. Ennis*, 27 Tex. 574.

<sup>8</sup> *Wiley v. Mahood*, 10 W. Va. 206.

<sup>9</sup> *Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261.

<sup>10</sup> *Barr v. Rader*, 31 Ore. 225, 49 Pac. 962.

<sup>11</sup> *Greenwell v. Roberts*, 7 La. 63.

<sup>12</sup> *Hartman Steel Co. v. Hoag*, 104 Iowa 269, 73 N. W. 611.

<sup>13</sup> *Clark v. Kingsland*, 1 Smedes & M. (Miss.) 248; *Cake v. Olmstead*, 1 Am. L. J. N. S. (Pa.) 169.

<sup>14</sup> *United States.*—*Kington v. Kincaid*, 1 Wash. 454, 14 Fed. Cas. No. 7,822.

*Alabama.*—*Gullett v. Lewis*, 3 Stew. 23; *Craig v. Ely*, 5 Stew. & P. 354; *Cost v. Genette*, 1 Port. 212.

*Iowa.*—*McCarver v. Nealey*, 1 G. Greene 360.

*Mississippi.*—*Wenans v. Lindsey*, 1 How. 577; *Keller v. Scott*, 2 Smedes & M. 81.

*Missouri.*—*Vanderline v. Smith*, 18 Mo. App. 55.

*Nebraska.*—*Hamrick v. Combs*, 14 Neb. 381, 15 N. W. 731.

*North Carolina.*—*Child v. Dwight*, 21 N. C. 171.

*Pennsylvania.*—*Chambers v. Miller*, 7 Watts 63.

*Virginia.*—*Wilkinson v. Holloway*, 7 Leigh 277.

<sup>15</sup> *Holliday v. Thomas*, 90 Ind. 398; *Dupre v. Splane*, 16 La. 51; *Barr v.*

security.<sup>16</sup> But it seems that an attorney, having in his hands claims for collection, will, when it is necessary to secure such collection, be presumed to have authority to take collateral security therefor in his own name.<sup>17</sup> If, however, an attorney does accept payment, other than money, and actually collects money thereon, the sum he receives will operate *pro tanto* in extinguishment of the debt, even though he has not paid it to his client.<sup>18</sup> Of money so received and paid to the client there can, of course, be no ques-

Rader, 31 Ore. 225, 49 Pac. 962;  
Kenny v. Hazeltine, 6 Humph.  
(Tenn.) 62; Wiley v. Mahood, 10 W.  
Va. 206.

<sup>16</sup> *Arkansas*.—Walker v. Scott, 13  
Ark. 644.

*Colorado*.—Black v. Drake, 2 Colo.  
330.

*Georgia*.—Jeter v. Haviland, 24  
Ga. 252.

*Illinois*.—Lochenmeyer v. Fogarty,  
112 Ill. 572.

*Indiana*.—Miller v. Edmonston, 8  
Blackf. 291; Jones v. Ransom, 3 Ind.  
327.

*Massachusetts*.—Langdon v. Potter,  
13 Mass. 320.

*Mississippi*.—Fitch v. Scott, 3 How.  
314, 34 Am. Dec. 86; Garvin v. Lowry,  
7 Smedes & M. 24.

*Missouri*.—Houx v. Russell, 10 Mo.  
246.

*Louisiana*.—Nolan v. Rogers, 4  
Mart. N. S. 145; Hicky v. Sharp, 4  
La. 335.

*New York*.—Finlay v. Heyward, 35  
Misc. 266, 71 N. Y. S. 779, *reversing*  
34 Misc. 818, 69 N. Y. S. 648.

*South Carolina*.—Tankersley v. An-  
derson, 4 Desaus. 44.

*Tennessee*.—Kenny v. Hazeltine, 6  
Humph. 63; Glass v. Davidson, 1  
Baxt. 47.

*Texas*.—See Bradford v. Arnold, 33

Tex. 412; Scott v. Atchison, 38 Tex.  
384.

*Vermont*.—Carter v. Talcott, 10  
Vt. 471.

*Virginia*.—Smith v. Lamberts, 7  
Grat. 138; Wilkinson v. Holloway,  
7 Leigh 277; Smock v. Dade, 5 Rand.  
639, 16 Am. Dec. 780.

*West Virginia*.—Wiley v. Mahood,  
10 W. Va. 206; Kent v. Chapman, 18  
W. Va. 485.

*Wisconsin*.—Kelly v. Wright, 65  
Wis. 236, 26 N. W. 610.

<sup>17</sup> Dolan v. Van Demark, 35 Kan.  
304, 10 Pac. 848.

<sup>18</sup> Black v. Drake, 2 Colo. 330; Har-  
bach v. Colvin, 73 Ia. 638, 35 N. W.  
663; Glass v. Davidson, 1 Baxt.  
(Tenn.) 47; Smith v. Lamberts, 7  
Grat. (Va.) 138; Smock v. Dade, 5  
Rand. (Va.) 639, 16 Am. Dec. 780;  
Wiley v. Mahood, 10 W. Va. 206.

*Contra*.—In Kenny v. Hazeltine, 6  
Humph. (Tenn.) 62, it was held that  
the reception of notes or evidences  
of debt by an attorney at law in dis-  
charge of a claim in his hands for  
collection was not a payment, and  
that when the money was collected  
on such claims it remained in the  
hands of the attorney at the risk of  
the debtor until it was appropriated  
or applied to the satisfaction of the  
claim. See also Price v. White, 70  
Ga. 381.

tion.<sup>19</sup> On learning of his attorney's acceptance of something other than money, the client may either proceed against the attorney individually, thereby ratifying the payment, or he may proceed against the debtor, as if no payment had been made.<sup>20</sup> An attorney may, of course, be expressly authorized to accept payment in something other than money;<sup>1</sup> but such authority must be shown otherwise than by the declarations of the attorney,<sup>2</sup> the burden being on the party seeking to avail himself of it.<sup>3</sup> So, also, an attorney's unauthorized act in accepting other than a money payment, may be ratified by his client,<sup>4</sup> and his acquiescence therein may be sufficient evidence of such ratification.<sup>5</sup>

**§ 220. Accepting Less than Amount Due.** — The general rule also prohibits an attorney from receiving, in the absence of authority from his client, a sum less than that actually due in satisfaction of his client's claim,<sup>6</sup> especially where it has been

<sup>19</sup> *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132.

<sup>20</sup> *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *O'Reiley v. Call*, 7 Ky. L. Rep. 516; *Smock v. Dade*, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

<sup>1</sup> *Moore v. Murrell*, 56 Ark. 375, 19 S. W. 973. And see *infra*, § 226.

<sup>2</sup> *Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201.

<sup>3</sup> *Portis v. Ennis*, 27 Tex. 574.

<sup>4</sup> *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Wiley v. Mahood*, 10 W. Va. 206. See also *supra*, §§ 211-214.

<sup>5</sup> *Kallander v. Neidhold*, 112 Mich. 329, 70 N. W. 892; *Finlay v. Heyward*, 35 Misc. 266, 71 N. Y. S. 779, 34 Misc. 818, 69 N. Y. S. 648; *Benedict v. Smith*, 10 Paige (N. Y.) 126; *Johnson v. Gibbons*, 27 Grat. (Va.) 632; *Sawyer v. Vermont Loan & Trust Co.*, 41 Wash. 524, 84 Pac. 8.

<sup>6</sup> *United States*.—*Abbe v. Rood*, 6 McLean 106, 1 Fed. Cas. No. 6; *Bates v. Seabury*, 1 Sprague 433, 2 Fed. Cas. No. 1,104.

*Alabama*.—*Hall Safe, etc., Co. v. Harwell*, 88 Ala. 441, 6 So. 750; *Henderson v. Planters', etc., Bank*, 59 So. 493.

*Georgia*.—*Sonnebom v. Moore*, 105 Ga. 497, 30 S. E. 947; *Kaiser v. Hancock*, 106 Ga. 217, 32 S. E. 123; *Patterson v. Childs*, 9 Ga. App. 646, 72 S. E. 45; *Bell v. Kwilecki*, 11 Ga. App. 9, 74 S. E. 444.

*Delaware*.—*Wood v. Bangs*, 2 Penn. 435, 48 Atl. 189.

*Illinois*.—*Nolan v. Jackson*, 16 Ill. 272; *Vickery v. McClennan*, 61 Ill. 311; *Miller v. Lane*, 13 Ill. App. 648; *Schreiber v. Straus*, 147 Ill. App. 581.

*Indiana*.—*Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441.

*Iowa*.—*Bigler v. Toy*, 68 Iowa 687, 28 N. W. 17; *Martin v. Capital Ins. Co.*, 85 Iowa 643, 52 N. W. 534; *Cottrell v. Wheeler*, 89 Iowa 754, 57 N. W. 434.

*Kentucky*.—*Harrow v. Farrow*, 7

previously reduced to the form of a judgment, or decree.<sup>7</sup> The

*B. Mon.* 126, 45 *Am. Dec.* 60; *Cox v. Adelsdorf*, 51 *S. W.* 616.

*Louisiana*.—*Pickett v. Bates*, 3 *La. Ann.* 627.

*Maine*.—*Jewett v. Wadleigh*, 32 *Me.* 110.

*Maryland*.—*Doub v. Barnes*, 4 *Gill* 1; *Maddux v. Bevan*, 39 *Md.* 485; *Hamburger v. Paul*, 51 *Md.* 219; *Real Estate Trust Co. v. Union Trust Co.*, 102 *Md.* 41, 61 *Atl.* 228.

*Massachusetts*.—*Lewis v. Gamage*, 1 *Pick.* 347.

*Michigan*.—*Fetz v. Leyendecker*, 157 *Mich.* 355, 122 *N. W.* 100.

*Minnesota*.—*Burgraf v. Byrnes*, 94 *Minn.* 418, 103 *N. W.* 215.

*Missouri*.—*State v. Clifford*, 124 *Mo.* 492, 28 *S. W.* 5; *Vanderline v. Smith*, 18 *Mo. App.* 55.

*New Jersey*.—*Faughnan v. Elizabeth*, 58 *N. J. L.* 309, 33 *Atl.* 212.

*New York*.—*Benedict v. Smith*, 10 *Paige* 126; *Lewis v. Woodruff*, 15 *How. Pr.* 539; *Beers v. Hendrickson*, 45 *N. Y.* 665; *De Mets v. Dagron*, 53 *N. Y.* 635; *Tito v. Seabury*, 18 *Misc.* 283, 41 *N. Y. S.* 1041; *Harkavy v. Zisman*, 96 *N. Y. S.* 214.

*Ohio*.—*Countee v. Armstrong*, 9 *Ohio Dec. (Reprint)* 62, 10 *Cinc. L. Bul.* 339.

*Texas*.—*Peters v. Lawson*, 66 *Tex.* 336, 17 *S. W.* 734.

*West Virginia*.—*Crotty v. Eagle*, 35 *W. Va.* 151, 13 *S. E.* 59.

*Wisconsin*.—*Kelly v. Wright*, 65 *Wis.* 236, 26 *N. W.* 610.

*Partial Payments*.—It has been held that an attorney may receive partial payments on any claim put in his hands for collection. *Pickett v. Bates*, 3 *La. Ann.* 627; *Whelan v.*

*Reilly*, 61 *Mo.* 565; *Williams v. Walker*, 2 *Sandf. Ch. (N. Y.)* 325. And see *supra*, § 205.

<sup>7</sup> *United States*.—*Pierce v. Brown*, 8 *Biss.* 534, 19 *Fed. Cas. No.* 11,143.

*Alabama*.—*Robinson v. Murphy*, 69 *Ala.* 543.

*Arkansas*.—*Whiting v. Beebe*, 12 *Ark.* 421.

*Colorado*.—*McMurray v. Marsh*, 12 *Colo. App.* 95, 54 *Pac.* 852.

*Illinois*.—*People v. Cole*, 84 *Ill.* 327; *Miller v. Lane*, 13 *Ill. App.* 648; *Stocking v. Knight*, 19 *Ill. App.* 501.

*Indiana*.—*Jones v. Ransom*, 3 *Ind.* 327.

*Kentucky*.—*Harrow v. Farrow*, 7 *B. Mon.* 126, 45 *Am. Dec.* 60; *Heath v. Com.*, 129 *Ky.* 835, 113 *S. W.* 69; *Sebastian v. Rose*, 135 *Ky.* 197, 122 *S. W.* 120; *Smiley v. U. S. Building, etc., Assoc.*, 62 *S. W.* 853, 23 *Ky. L. Rep.* 250.

*Maine*.—*Jewett v. Wadleigh*, 32 *Me.* 110; *Wilson v. Wadleigh*, 36 *Me.* 496.

*Maryland*.—*Maddux v. Bevan*, 39 *Md.* 485; *Rohr v. Anderson*, 51 *Md.* 205.

*Massachusetts*.—*Lewis v. Gamage*, 1 *Pick.* 347.

*Minnesota*.—*Johnson v. Dun*, 75 *Minn.* 533, 78 *N. W.* 98.

*Mississippi*.—*Parker v. McBee*, 61 *Miss.* 134; *Rice v. Troup*, 62 *Miss.* 186.

*Missouri*.—*Roberts v. Nelson*, 22 *Mo. App.* 28; *Schlemmer v. Schlemmer*, 107 *Mo. App.* 487, 81 *S. W.* 636.

*Nebraska*.—*Hamrich v. Combs*, 14 *Neb.* 381, 15 *N. W.* 731; *Smith v. Jones*, 47 *Neb.* 108, 66 *N. W.* 19, 53 *Am. St. Rep.* 519.

debtor is not injured by being compelled to pay the whole debt,<sup>8</sup> and it has been held that one who undertakes to settle with an attorney for less than the actual debt must, at his peril, ascertain whether the attorney is authorized to make such a compromise,<sup>9</sup> the burden being upon him to establish that fact.<sup>10</sup> A fraudulent receipt given by an attorney for the whole amount due his client, upon payment to him of a portion thereof, is not binding.<sup>11</sup> But an attorney may assent to the correction of a clerical error in a judgment or decree, although such a correction may materially reduce the amount to be recovered by his client.<sup>12</sup> So, less than the full amount may be taken under authority from the client;<sup>13</sup> or, if taken without authority, the attorney's act may be ratified.<sup>14</sup> In the absence of authority or ratification, however, the client

*New Jersey*.—Faughnan v. Elizabeth, 58 N. J. L. 309, 33 Atl. 212; Watts v. Frenche, 19 N. J. Eq. 407.

*New York*.—Beers v. Hendrickson, 45 N. Y. 665, modifying 6 Robt. 53; Lowman v. Elmira, C. & N. R. Co., 85 Hun 188, 32 N. Y. S. 579, affirmed 154 N. Y. 765, 49 N. E. 1099; Wood v. New York, 44 App. Div. 299, 60 N. Y. S. 759; Tito v. Seabury, 18 Misc. 283, 41 N. Y. S. 1041; Woodford v. Rasbach, 6 Civ. Proc. 315, appeal dismissed 99 N. Y. 659; Quinn v. Lloyd, 36 How. Pr. 378.

*Ohio*.—Wilson v. Jennings, 3 Ohio St. 528; Boyle v. Beattie, 2 Cinc. Super. Ct. 490.

*Pennsylvania*.—Housenick v. Miller, 93 Pa. St. 514; North Whitehall Tp. v. Keller, 100 Pa. St. 105, 45 Am. Rep. 361, 12 W. N. C. 177; Philadelphia & R. R. Co. v. Christman, 4 Penny. 271; Ely v. Lamb, 10 Pa. Co. Ct. 209; Schroeder v. Gillespie, 2 Pa. Dist. Ct. 221.

*Texas*.—Peters v. Lawson, 66 Tex. 336, 17 S. W. 734.

*West Virginia*.—Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

<sup>8</sup> Lewis v. Gamage, 1 Pick. (Mass.) 347.

<sup>9</sup> Sonneborn v. Moore, 105 Ga. 497, 30 S. E. 947; Kaiser v. Hancock, 106 Ga. 217, 32 S. E. 123.

<sup>10</sup> Kaiser v. Hancock, 106 Ga. 217, 32 S. E. 123.

<sup>11</sup> Chalfants v. Martin, 25 W. Va. 394.

Under section 772 of the *Indiana* Code (2 R. S. 1876, p. 305), an attorney has no authority to sign a receipt for money which he has not in fact received, and such a receipt is not binding on the client. McCormick v. Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518.

<sup>12</sup> Guay v. Andrews, 8 La. Ann. 141; Hill v. Bowyer, 18 Gratt. (Va.) 364.

<sup>13</sup> Gordon v. Coolidge, 1 Sumn. 537, 10 Fed. Cas. No. 5,606; Vickery v. McClellan, 61 Ill. 311; Hewitt v. Darlington Phosphate Co., 43 S. C. 5, 20 S. E. 804. And see also *infra*, §§ 225, 226.

<sup>14</sup> Reid v. Dickinson, 37 Iowa 56; Wyckoff v. Bergen, 1 N. J. L. 248. See also *supra*, § 211 et seq.

may recover the full amount of the debt,<sup>15</sup> less the sum paid to his attorney.<sup>16</sup> Since an attorney employed to conduct a suit has power to receive payments on account of his client's claim, or, after obtaining judgments, to collect the same and to accept payments on account thereof, a payment to him of an amount less than the face of the claim or judgment, accepted by him in full satisfaction, will be treated as a payment on account, and his client will be entitled to have the satisfaction set aside only on condition that he acknowledge of record the receipt of the amount received by the attorney.<sup>17</sup> In accordance with this rule, the

<sup>15</sup> *Jones v. Inness*, 32 Kan. 177, 4 Pac. 95; *Burgraf v. Byrne*, 94 Minn. 418, 103 N. W. 215; *Wood v. New York*, 44 App. Div. 299, 60 N. Y. S. 759; *North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361, 12 W. N. C. 177; *Pierrepoint v. Sassee*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1295.

<sup>16</sup> *United States*.—*Pierce v. Brown*, 8 Biss. 534, 19 Fed. Cas. No. 11,143; *Bates v. Seabury*, 1 Sprague 433, 21 Law Rep. 666, 2 Fed. Cas. No. 1,104.

*Colorado*.—*Black v. Drake*, 2 Colo. 330.

*Georgia*.—*Kaiser v. Hancock*, 106 Ga. 217, 32 S. E. 123.

*Minnesota*.—*Davis v. Severance*, 49 Minn. 528, 52 N. W. 140.

*New Jersey*.—*Faughnan v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212.

*New York*.—*Lowman v. Elmira*, C. & N. R. Co., 85 Hun 188, 32 N. Y. S. 579, *affirmed* in 154 N. Y. 765, 49 N. E. 1099; *Tito v. Seabury*, 18 Misc. 283, 41 N. Y. S. 1041. Compare *Wood v. New York*, 44 App. Div. 299, 60 N. Y. S. 759.

*Pennsylvania*.—*Philadelphia, etc., R. Co. v. Christman*, 4 Penny. 271; *North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361.

*Texas*.—*Pierrepoint v. Sassee*, 1

*White & W. Civ. Cas. Ct. App.* § 1294.

*Vermont*.—*Brown v. Mead*, 68 Vt. 215, 34 Atl. 950.

*West Virginia*.—*Watt v. Brookover*, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

In *Illinois*, however, it has been held that if the plaintiff never receives the amount collected by his attorney, the defendant is not entitled, on the vacation of the entry of satisfaction, to credit for the amount paid by him to the attorney. *Miller v. Lane*, 13 Ill. App. 648.

<sup>17</sup> *Wells v. Penfield*, 70 Minn. 66, 72 N. W. 816. See also the cases cited in the preceding note.

In a proceeding on a judgment where the defense is that it has been settled by the payment to the plaintiff's attorney of a smaller amount than the face of the judgment, but it appears that the attorney had no power to make such a compromise, and that the plaintiff refused to accept the money paid to his attorney, the payment should be treated as a payment on account, if it appears that it was made with the understanding that it should be so treated if the plaintiff was not willing to accept it in full satisfaction. *Rohr v. Anderson*, 51 Md. 205.

debtor cannot recover back from the attorney the partial payment.<sup>18</sup>

§ 221. **Effect of Unauthorized Compromise.**—The mere fact that a cause of action was compromised by an attorney without his client's consent does not render such compromise void,<sup>19</sup> but only voidable at the election of the client.<sup>20</sup> The client may, and usually does, ratify the action of his attorney; and, in that event, the compromise is, of course, as effective as if the attorney possessed the power to conclude it originally.<sup>1</sup> Should the client see fit to renudiate his attorney's action he may, in some jurisdictions, proceed with the original suit, or institute a new one, as if the compromise had never been made,<sup>2</sup> or he may ask the court to set the alleged compromise aside, and reinstate the cause on the record.<sup>3</sup> In such cases the client should act promptly on becoming informed of the act of his attorney; otherwise he may

Where an attorney has recovered judgment, and under his agreement with his client is entitled to a certain fee, his agreement with the defendant to remit a portion of the judgment in cancellation of his own indebtedness to the defendant, will be regarded as equivalent to the payment to him of the amount so retained by the defendant, and his client cannot recover the same from the defendant. *High v. Emerson*, 23 Wash. 103, 62 Pac. 455.

<sup>18</sup> *Pickett v. Bates*, 3 La. Ann. 627.

<sup>19</sup> *Williams v. Nolan*, 58 Tex. 708.

**Demurrer Admitting Authority.**—In *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 453, 53 Atl. 436, a plea that the plaintiff's counsel agreed in writing with the defendants to accept a certain sum in settlement of the plaintiff's claim, was held good on general demurrer, since the demurrer admitted that the person who made the agreement on the part of the plaintiff was the plaintiff's coun-

sel and as such had authority to enter into the agreement.

<sup>20</sup> *Helfer v. Spinner*, 147 Ill. App. 448; *Sebastian v. Rose*, 135 Ky. 197, 122 S. W. 120.

<sup>1</sup> See *supra*, §§ 211-214.

<sup>2</sup> *United States*.—*Harper v. National L. Ins. Co.*, 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505.

*Indiana*.—*Wakeman v. Jones*, 1 Ind. 517.

*Kansas*.—*Jones v. Inness*, 32 Kan. 177, 4 Pac. 95.

*Pennsylvania*.—*North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361.

*Virginia*.—*Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780.

<sup>3</sup> *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410.

Where an attorney makes a compromise or settlement of a cause, without any authority so to do, and causes an order of dismissal "as per stipula-

be chargeable with laches, or his conduct may be considered an implied ratification,<sup>4</sup> especially where the agreement to compromise has been followed by a consent judgment.<sup>5</sup>

§ 222. **When Set Aside.** — On a motion to set aside an unauthorized compromise, the real question is as to the power and authority of the attorney;<sup>6</sup> and where his want of authority appears to the satisfaction of the court, the compromise will, as a general rule, be set aside,<sup>7</sup> due credit being given for the amount paid to the attorney where the facts warrant it.<sup>8</sup> But notwithstanding the general rule, the courts are not inclined to disturb a compromise which is not so unreasonable in itself as to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case.<sup>9</sup> And it has been held that every reasonable presumption will be indulged in favor of the settlement, especially after it has been recognized by the court, and judgment has been rendered on the agreement.<sup>10</sup> Certainly, in such cases, very slight evidence of acquiescence on the client's part will be deemed a ratification of the attorney's act in making the compromise.<sup>11</sup> A compromise made by the parties'

tion," based on such settlement, to be entered, such order may be set aside and vacated, upon the application of his aggrieved client promptly presented. *Turner v. Fleming*, (Okla.) 130 Pac. 551.

<sup>4</sup> *Reid v. Dickinson*, 37 Ia. 56; *Sebastian v. Rose*, 135 Ky. 197, 122 S. W. 120; *Dupre v. Splane*, 16 La. 51; *Black v. Rogers*, 75 Mo. 441; *Bay v. Trusdell*, 92 Mo. App. 377; *Finlay v. Heyward*, 35 Misc. 266, 71 N. Y. S. 779, 34 Misc. 818, 69 N. Y. S. 648; *Johnson v. Gibbons*, 27 Gratt. (Va.) 632. See also *supra*, § 214.

<sup>5</sup> *Preston v. Hill*, 50 Cal. 54, 19 Am. Rep. 647; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Williams v. Nolan*, 58 Tex. 708. See also *Huston v. Mitchell*, 14 S. & R. (Pa.) 307, 16 Am. Dec. 506.

<sup>6</sup> *Senn v. Joseph*, 106 Ala. 454, 17 So. 543.

Evidence that the client could not have recovered so large an amount as that represented by the judgment is immaterial and irrelevant. *Senn v. Joseph*, 106 Ala. 454, 17 So. 543.

<sup>7</sup> See the cases cited under §§ 215, 221.

<sup>8</sup> See *supra*, § 219.

<sup>9</sup> *Holker v. Parker*, 7 Cranch 436, 3 U. S. (L. ed.) 396; *Roller v. Wooldrige*, 46 Tex. 485; *Williams v. Nolan*, 58 Tex. 708.

<sup>10</sup> *Williams v. Nolan*, 58 Tex. 708.

<sup>11</sup> *United States*.—*Holker v. Parker*, 7 Cranch 436, 3 U. S. (L. ed.) 396; *Stowe v. U. S.*, 19 Wall. 13, 22 U. S. (L. ed.) 144; *Mayer v. Foulkrod*, 4 Wash. 511, 16 Fed. Cas. No. 9,342; *Jeffries v. Mutual L. Ins. Co.*, 110 U.



attorneys under a mistake of fact may be rescinded by either party.<sup>13</sup> But a third person cannot question an attorney's authority to settle his client's case,<sup>14</sup> particularly one who has been benefited by it;<sup>14</sup> nor can it be attacked collaterally.<sup>15</sup>

§ 223. Rule in Canada. — While it has been held that as between solicitor and client, the solicitor has power to compromise, not only without but contrary to the consent or directions of the client, so long as the opponent or other person dealt with has no notice of the limitation of the solicitor's ostensible authority,<sup>16</sup> nevertheless the general trend of authority in Canada is to the effect that a solicitor cannot compromise the cause of action without his client's consent.<sup>17</sup> Thus it has been held that the client will not be bound where his solicitor accepts, in satisfaction of a

S. 305, 4 S. Ct. 8, 28 U. S. (L. ed.) 156.

*Illinois*.—Vickery v. McClellan, 61 Ill. 311.

*Iowa*.—Reid v. Dickinson, 37 Iowa 56. See also Potter v. Parsons, 14 Iowa 286; Bennett v. Phillips, 57 Iowa 174, 10 N. W. 328.

*Maryland*.—White v. Davidson, 8 Md. 169, 63 Am. Dec. 699.

*Massachusetts*.—Peru Steel, etc., Co. v. Whipple File, etc., Mfg. Co., 109 Mass. 464.

*Mississippi*.—Levy v. Brown, 56 Miss. 83.

*Rhode Island*.—Whipple v. Whitman, 13 R. I. 512, 43 Am. Rep. 42.

*Texas*.—Roller v. Wooldridge, 46 Tex. 485; Williams v. Nolan, 58 Tex. 708; East Line, etc., R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758, 38 Am. & Eng. R. Cas. 16.

*Washington*.—Livesley v. Pier, 11 Wash. 268, 39 Pac. 660.

*Wisconsin*.—Mallory v. Mariner, 15 Wis. 172.

<sup>13</sup> New York, N. H. & H. R. Co. v. Martin, 158 Mass. 313, 33 N. E. 578; Attys. at L. Vol. I.—26.

Boyle v. Beattie, 2 Cinc. Super. Ct. 490.

<sup>14</sup> Pond v. Lockwood, 8 Ala. 669; Hirsch v. Fleming, 77 Ga. 594, 3 S. E. 9; Sawyer v. Vermont L. & T. Co., 41 Wash. 524, 84 Pac. 8.

<sup>15</sup> Filby v. Miller, 25 Pa. St. 264.

<sup>16</sup> In Biddle v. Pierce, 13 Ind. App. 239, 41 N. E. 475, it was held that where an attorney for a party to an action signed an agreement of compromise upon which judgment was entered, it must be presumed, in a collateral proceeding, that he had full power to bind his client in an amicable settlement until the contrary was made to appear; and that if he had no authority to bind the client by agreeing to the judgment, it was necessary for the client to take steps to have the judgment set aside.

<sup>17</sup> Hackett v. Bible, 12 Ont. Pr. 482; Vardon v. Vardon, 6 Ont. 719.

<sup>18</sup> King v. Pinsoneault, 22 L. C. Jur. 58, 6 Rev. Leg. 703, 44 L. J. P. C. 42, L. R. 6 P. C. (Eng.) 245, 32 L. T. N. S. 174, 23 W. R. 576. See also Young v. Shore, 2 U. C. Q. B. O. S. 348;

debt, a sum less than the amount due.<sup>18</sup> And where counsel, acting under the instructions of the plaintiff's solicitor, compromised the action upon terms which the plaintiff had instructed the solicitor not to accept, it was held that the plaintiff was not bound by the agreement.<sup>19</sup> So, a provision settlement by a solicitor, subject to the approval of his client, is not binding on the client if he does not ratify it.<sup>20</sup>

§ 224. Rule in England. — In England it is well settled that an attorney, whether barrister or solicitor, has power to bind his client by the compromise of a pending action,<sup>1</sup> even though the client subsequently repudiates it.<sup>2</sup> But a solicitor has no authority to compromise before the action is begun.<sup>3</sup> An attorney

*Brown v. Blackwell*, 26 U. C. C. P. 43; *Watt v. Clark*, 12 Ont. Pr. 359.

An attorney for the plaintiff has no right to do more than discharge the action in which he is retained, and has no power to compromise another right of action accruing to his client in the course of the proceedings in such action. Hence, in an action against a sheriff for an escape, it is no defense that after the escape the sheriff paid to the plaintiff's attorney in the first suit the debt and costs indorsed on the writ against the party who escaped in full discharge of all damage occasioned by the escape, since the attorney had no right to compromise the plaintiff's right to sue for the escape. *Stocking v. Cameron*, 6 U. C. Q. B. O. S. 475.

<sup>18</sup> *Nova Scotia Bank v. Morrow*, 17 N. Bruns. 343.

<sup>19</sup> *Benner v. Edmonds*, 19 Ont. Pr. 9.

<sup>20</sup> *McDonald v. Field*, 12 Ont. Pr. 213, reversing 9 Ont. Pr. 220.

<sup>1</sup> *Chown v. Parrott*, 14 C. B. N. S. 74, 108 E. C. L. 74, 9 Jur. N. S. 1290, 32 L. J. C. Pl. 197, 8 L. T. N. S. 391,

11 W. R. 608; *Prestwich v. Poley*, 18 C. B. N. S. 806, 114 E. C. L. 806, 34 L. J. C. Pl. 189, 11 Jur. N. S. 583, 12 L. T. N. S. 390, 13 W. R. 753; *In re West Devon Great Consols. Mine*, 38 Ch. D. 51, 57 L. J. Ch. 850, 58 L. T. N. S. 61, 36 W. R. 342; *In re Newen*, [1903] 1 Ch. 812, [1903] W. N. 52; *Thomas v. Harris*, 27 L. J. Exch. 353; *Rumsey v. King*, 33 L. T. N. S. 728. See also *Thomas v. Hewes*, 2 C. & M. 519, 4 Tyrw. 335; *Wright v. Sorseby*, 2 C. & M. 671, 4 Tyrw. 434, 3 L. J. Exch. 207; *Strauss v. Francis*, L. R. 1 Q. B. 379, 7 B. & S. 365, 12 Jur. N. S. 486, 35 L. J. Q. B. 133, 14 L. T. N. S. 326, 14 W. R. 634; *Matthews v. Munster*, 20 Q. B. D. 141, 57 L. J. Q. B. 49, 57 L. T. N. S. 922, 36 W. R. 178, 52 J. P. 260.

The foregoing cases overrule *Swinfen v. Swinfen*, 24 Beav. 549, 27 L. J. Ch. 35, 3 Jur. N. S. 1109, affirmed in 2 De G. & J. 381, 27 L. J. Ch. 491, 4 Jur. N. S. 774, 6 W. R. 480.

<sup>2</sup> *Berry v. Mullen*, Ir. R. 5 Eq. 368; *Brady v. Curran*, Ir. R. 2 C. L. 314, 16 W. R. 514.

<sup>3</sup> *Macaulay v. Polley*, [1897] 2 Q. B.

admitted to prosecute or defend represents his client throughout the cause, but a counsel represents his client only when speaking for him in court. Hence, a communication to or by the counsel for a party out of court, but respecting the proceedings in the cause, is not binding upon him;<sup>4</sup> and, even though made in open court, the client will not be bound where his counsel acted under a mistake of fact.<sup>5</sup> A compromise entered into by an attorney notwithstanding his client's instructions to the contrary gives the client a right of action for damages; and it is immaterial that the compromise was made under the advice of counsel engaged by the attorney under his retainer.<sup>6</sup> But the compromise itself

122, 76 L. T. N. S. 643, 45 W. R. 681; *Duffy v. Hanson*, 16 L. T. N. S. 332.

<sup>4</sup> *Richardson v. Peto*, 1 M. & G. 896, 39 E. C. L. 701, 9 Dowl. 73; *Green v. Crockett*, 34 L. J. Ch. 606, 12 L. T. N. S. 749, 13 W. R. 1052; *Latuch v. Pash-erante*, 1 Salk. 86; *In re Hobler*, 8 Beav. 101; *Mole v. Smith*, 1 Jac. & W. 645; *Holt v. Jesse*, 3 Ch. D. 177; *Harvey v. Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249; *Rumsey v. King*, 33 L. T. N. S. 728.

<sup>5</sup> Where counsel consented to an agreement of compromise under a misapprehension, so that he conceded more than he intended, and the minds of the parties to the agreement never met, it was held that neither he nor his client was bound by the compromise and that the court would set it aside. *Hickman v. Berens*, [1895] 2 Ch. 638.

Where counsel in open court, but in the absence of the client's solicitor, accepted a compromise proposition made by counsel for the opposite party, in ignorance of the fact that the party had previously rejected a similar proposition, it was held that counsel were not apprised of the facts, the knowledge of which was essential in reference to the question on which

they were to exercise their discretion, and that the client was not bound by the agreement. And it was further held that he was not bound by his solicitor's failure to object immediately to the settlement, and his delaying action for a few days and until the client arrived in town. *Furnival v. Bogle*, 4 Russ. 142, 6 L. J. Ch. 91, 28 Rev. Rep. 34.

<sup>6</sup> *Fray v. Voules*, 1 El. & El. 839, 102 E. C. L. 839, 5 Jur. N. S. 1253, 28 L. J. Q. B. 232, 7 W. R. 446.

In an early case relating to the liability of an attorney to the opposite party on an agreement of compromise, the rule was laid down that if he signed without authority from his client he was himself liable thereon, but that if he had authority, he signed merely as agent or broker, and was not liable. *Johnson v. Ogilby*, 3 P. Wms. 277.

An instruction to a solicitor that, failing an order dismissing the application of the opposite party, "you will please adjourn the matter to the judge in London," does not constitute an instruction not to compromise. *In re Newen*, [1903] 1 Ch. 812, [1903] W. N. 52.

is not affected by his client's previous prohibition thereof, unless the opposite party had notice of it, or did not act *bona fide*.<sup>7</sup>

*Compromise Authorized by Client.*

§ 225. Operation and Extent of Authority. — The client may, and often does, authorize his attorney to compromise a cause of action, or other claim,<sup>8</sup> and in such cases the client is bound by the act of the attorney, not only to the extent of the authority conferred,<sup>9</sup> but also to such extent as the person with whom he deals has a right to believe him to be possessed,<sup>10</sup> although it may embrace matters outside the scope of the suit,<sup>11</sup> and the client cannot subsequently shelter himself behind a restriction upon the authority of the attorney, of which the party dealing with him had no notice, and which was not disclosed at the time of the transaction;<sup>12</sup> and this is true even though the attorney intends

<sup>7</sup> *Berry v. Mullen*, Ir. R. 5 Eq. 368; *Brady v. Curran*, Ir. R. 2 C. L. 314, 16 W. R. 514.

<sup>8</sup> *Freeman v. Brehm*, (Ind.) 30 N. E. 712, 31 N. E. 545; *Albee v. Hayden*, 25 Minn. 267; *Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222; *Trenton St. R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668; *Peries v. Ay-cinena*, 3 Watts & S. (Pa.) 64.

<sup>9</sup> *United States*.—*Jeffries v. Union Mut. L. Ins. Co.*, 1 Fed. 450, 1 McCrary 117.

*Arkansas*.—*Beal & Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58.

*Indiana*.—*Freeman v. Brehm*, 30 N. E. 712, affirmed 31 N. E. 545.

*Louisiana*.—*Phelps v. Hodge*, 6 La. Ann. 524.

*Minnesota*.—*Albee v. Hayden*, 25 Minn. 267.

*Missouri*.—*Black v. Rogers*, 75 Mo. 441.

*New Jersey*.—*Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222.

*New York*.—*Carstens v. Schmalholz*, 16 Daly 26, 8 N. Y. S. 529; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417.

*Rhode Island*.—*Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42.

*Washington*.—*Livesley v. Pier*, 11 Wash. 268, 39 Pac. 660; *High v. Emerson*, 23 Wash. 103, 62 Pac. 455.

*Canada*.—*Norquay v. Broggio*, 2 West. L. Rep. (Yukon Terr.) 108.

<sup>10</sup> *Freeman v. Brehm*, (Ind.) 30 N. E. 712, 31 N. E. 545; *Matter of Heath*, 83 Ia. 215, 48 N. W. 1037; *Thompson v. Missouri Pac. R. Co.*, 134 Mo. App. 591, 113 S. W. 1142; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417; *East Line, etc., R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; *Livesley v. Pier*, 11 Wash. 268, 39 Pac. 660.

<sup>11</sup> *Carstens v. Schmalholz*, 16 Daly 26, 8 N. Y. S. 529.

<sup>12</sup> *Peru Steel & Iron Co. v. Whipple*

to defraud his client, providing, of course, that the other party does not participate in the fraud.<sup>13</sup> Ordinarily, however, an attorney will be confined to the terms of the authority with which he is vested,<sup>14</sup> nor can such authority be extended by his unauthorized statements.<sup>15</sup> An express authority to compromise is revoked by specific instructions to secure judgment by suit;<sup>16</sup> but revocation will be ineffective after a compromise has been made.<sup>17</sup>

**§ 226. Sufficiency of Authority.** — Sufficient authority to compromise a pending cause of action may be conferred by the real party in interest.<sup>18</sup> Where an attorney receives a claim for collection from an attorney in another state, and, after obtaining judgment, settles under authority given him by such foreign attorney, the latter acts as attorney in fact, and, therefore, the client cannot deny his power to authorize the local attorney to settle.<sup>19</sup>

*File & Steel Mfg. Co.*, 109 Mass. 464; *Black v. Rogers*, 75 Mo. 441; *Kelly v. Chicago & A. R. Co.*, 113 Mo. App. 468, 87 S. W. 583; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417.

<sup>13</sup> *Miller v. Dallas Consol. Electric St. R. Co.*, (Tex.) 124 S. W. 453.

*Compare Riley v. Boston El. R. Co.*, 195 Mass. 318, 81 N. E. 197, wherein a fraudulent settlement, procured by the attorney's forgery, was held to be ineffective.

<sup>14</sup> *Lewis v. Lewis*, 45 Ch. D. (Eng.) 281; *Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430; *Roberts v. Rumley*, 58 Iowa 301, 12 N. W. 323; *Harrow v. Farrow*, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60; *Barton v. Hunter*, 59 Mo. App. 610; *Melcher v. Exchange Bank*, 85 Mo. 362; *Timm v. Timm*, 34 Wash. 228, 75 Pac. 879; *Chilton v. Willford*, 2 Wis. 1, 60 Am. Dec. 399.

An attorney's agreement with his client to accept land in payment of his fees for bringing an action of ejectment, does not authorize him to

agree to divide the land between himself and the defendant, *Filby v. Miller*, 25 Pa. St. 264; or to confess a judgment against the client, thereby giving a lien upon land embracing the client's homestead, *Adams v. Roller*, 35 Tex. 711.

The general attorney for a railroad company authorized by it to settle suits for personal injuries has been held not to have, as an incident to such authority, power to bind the company by an agreement to employ an injured employee for the rest of his life. *Nephew v. Michigan Cent. R. Co.*, 128 Mich. 599, 87 N. W. 753, 8 Detroit Leg. N. 784.

<sup>15</sup> *Joseph v. Platt*, 130 App. Div. 478, 114 N. Y. S. 1065.

<sup>16</sup> *Maxwell v. Pate*, (Miss.) 16 So. 529.

<sup>17</sup> *Foot v. Smythe*, 20 Colo. App. 320, 78 Pac. 619.

<sup>18</sup> *Whipple v. Whitman*, 13 R. I. 512, 43 Am. Rep. 42.

<sup>19</sup> *Schroeder v. Gillespie*, 2 Pa. Dist. Ct. 221. See also *Thompson v. Miss-*

So, an attorney holding an assignment of his client's claim for the purpose of enabling him, without interference by the client, to settle and adjust conflicting claims according to his best judgment, having in view the client's interest, is clothed with discretion in the matter of compromising with adverse claimants.<sup>80</sup> Where a client agrees in writing that his attorney may compromise a pending claim, or cause of action, and such compromise is fairly and honestly effected, it will not be set aside merely because the client did not understand it.<sup>1</sup> In some cases there may be an implied right in the attorney to effect a compromise, resulting either from the character of the claim or the circumstances connected with it.<sup>2</sup> Thus authority may be predicated on the course of dealing between the attorney and his client.<sup>3</sup> And where a compromise of tax claims was entered into by a county attorney and a city solicitor, it was presumed that those attorneys had authority to act for the county and city.<sup>4</sup> So the employment of an attorney to prosecute a suit for land, carries with it authority to compromise a claim against a disseizor for *mesne* profits during the pendency of the suit.<sup>5</sup> And it is within the authority of a judgment creditor's attorney to discharge a claimant of property levied upon from liability for any damages assessed, and for the value of the use of the property, in consideration of its return.<sup>6</sup> It is well settled that authority to compromise may be implied from circumstances;<sup>7</sup> thus such authority may be inferred from an in-

ouri Pac. R. Co., 134 Mo. App. 591, 113 S. W. 1142.

<sup>80</sup> *Jeffries v. Mutual L. Ins. Co.*, 110 U. S. 305, 4 S. Ct. 8, 28 U. S. (L. ed.) 156, *affirming* 1 *McCrary* 117, 1 Fed. 450; *Foot v. Smythe*, 20 Colo. App. 320, 78 Pac. 619; *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 350.

<sup>1</sup> *Little v. Spreadbury*, [1910] 2 K. B. (Eng.) 658, 102 L. T. N. S. 829, 79 L. J. K. B. 1119, 54 Sol. J. 618, 26 Times L. Rep. 552; *Chambers v. Mason*, 5 C. B. N. S. 59, 94 E. C. L. 59, 5 Jur. N. S. 148, 28 L. J. C. Pl. 10.

<sup>2</sup> *North Whitehall Tp. v. Keller*, 100 Pa. St. 105, 45 Am. Rep. 361.

<sup>3</sup> *Jeter v. Haviland*, 24 Ga. 252.

<sup>4</sup> *People v. Quick*, 92 Ill. 580.

<sup>5</sup> *Bonney v. Morrill*, 57 Me. 368.

<sup>6</sup> *Willis v. Chowning*, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

<sup>7</sup> *California*.—*Chaffey v. Dexter*, 4 Pac. 980.

*Kentucky*.—*Cox v. Adelsdorf*, 51 S. W. 616, 21 Ky. L. Rep. 421.

*Maine*.—*Chapman v. Lothrop*, 39 Me. 431.

*Mississippi*.—*Levy v. Brown*, 56 Miss. 83.

*Missouri*.—*Grumley v. Webb*, 48 Mo. 562; *Bay v. Trusdell*, 92 Mo. App. 377.

struction to an attorney to do "the best he can,"<sup>8</sup> from an employment for the purpose of effecting a settlement,<sup>9</sup> or from the fact that the attorney was empowered to compromise other claims or actions.<sup>10</sup> Where an attorney advised his client that he would try to arrange a settlement, and an agreement to settle the controversy was made, and the party at no time attempted to evade the force thereof by any distinct claim that it was unauthorized by him, the agreement was not made without his authority, and he could not disregard it.<sup>11</sup> But an inquiry by a client as to the chances of getting a fifty per cent. cash settlement, does not authorize the attorney to accept such a settlement;<sup>12</sup> an instruction to bring suit for damages or to settle same by compromise, does not authorize a compromise without the client's consent, especially after he has actually brought an action.<sup>13</sup> Nor can an attorney's authority to compromise be proved by his own declarations.<sup>14</sup> Where defendant relies on an alleged accord and satisfaction entered into on behalf of plaintiff by her attorney, it is incumbent on defendant to show that the attorney had express authority to make the settlement.<sup>15</sup> And should the evidence as to the attorney's authority present a conflict, its determination is for the jury.<sup>16</sup>

*New York*.—*Dorman v. Arkin*, 120 N. Y. S. 757.

*Texas*.—*Miller v. Dallas Consol. Electric St. R. Co.*, 104 Tex. 57, 133 S. W. 866, *reversing* 124 S. W. 453.

*Wisconsin*.—*Mallory v. Mariner*, 15 Wis. 172.

<sup>8</sup> *Moore v. Murrell*, 56 Ark. 375, 19 S. W. 973; *Vickery v. McClellan*, 61 Ill. 311; *Freeman v. Brehm*, (Ind.) 31 N. E. 545, *affirming* 30 N. E. 712; *Wishard v. Biddle*, 64 Ia. 526, 21 N. W. 15; *Hewitt v. Darlington Phosphate Co.*, 43 S. C. 5, 20 S. E. 804.

<sup>9</sup> *Turner v. Campbell*, 59 Ind. 279; *Doon v. Donaher*, 113 Mass. 151; *Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222.

<sup>10</sup> *East Line, etc., R. Co. v. Scott*,

72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758.

<sup>11</sup> *Equitable Trust Co. v. MacLaire*, 77 Misc. 116, 135 N. Y. S. 1022.

<sup>12</sup> *Cox v. Adelsdorf*, (Ky.) 51 S. W. 616.

<sup>13</sup> *Brown v. Bunger*, 43 S. W. 714, 19 Ky. L. Rep. 1527.

<sup>14</sup> *Bigler v. Toy*, 68 Ia. 687, 28 N. W. 17; *Garvin v. Lowry*, 7 Smedes & M. (Miss.) 24.

<sup>15</sup> *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

<sup>16</sup> *United States*.—*Humphrey v. Thorp*, 89 Fed. 66.

*California*.—*Chaffey v. Dexter*, 4 Pac. 980.

*Illinois*.—*Strong v. Smith*, 98 Ill. App. 522.

*Release.*

§ 227. **Generally.**—The rule discussed in the preceding sections, which forbids an attorney to compromise his client's claims and causes of action unless given special permission to do so by the client,<sup>17</sup> necessarily applies with equal force to the release thereof.<sup>18</sup> A solicitor has no authority, under his retainer, to surrender any substantial right of his client without his con-

*Indiana.*—*Freeman v. Brehm*, 30 N. E. 712, 31 N. E. 545.

*Louisiana.*—*Phelps v. Hodge*, 6 La. Ann. 524; *Phelps v. Preston*, 9 La. Ann. 488.

*Maryland.*—*Rohr v. Anderson*, 51 Md. 205; *Fritchey v. Bosley*, 56 Md. 94.

*Massachusetts.*—*Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45.

*Michigan.*—*Eaton v. Knowles*, 61 Mich. 625, 28 N. W. 740; *Fetz v. Leyendecker*, 157 Mich. 355, 122 N. W. 100.

*Minnesota.*—*Albee v. Hayden*, 25 Minn. 267.

*Mississippi.*—*Garvin v. Lowry*, 7 Smed. & M. 24.

*Missouri.*—*Willard v. A. Siegel Gas-Fixture Co.*, 47 Mo. App. 1; *Barton v. Hunter*, 59 Mo. App. 610; *Bay v. Trusdell*, 92 Mo. App. 377.

*New Jersey.*—*Terhune v. Colton*, 10 N. J. Eq. 21; *Phillips v. Pullen*, 50 N. J. L. 439, 14 Atl. 222.

*New York.*—*Woodford v. Rasbach*, 6 Civ. Pro. 315, *appeal dismissed* 99 N. Y. 659; *McKechnie v. McKechnie*, 3 App. Div. 91, 39 N. Y. S. 402; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417; *Dorman v. Arkin*, 120 N. Y. S. 757.

*Tennessee.*—*Conley v. Whitthorne*, 68 S. W. 380.

*Texas.*—*East Line, etc., R. Co. v.*

*Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758, 38 Am. & Eng. R. Cas. 16.

*Vermont.*—*Vail v. Conant*, 15 Vt. 314.

*Washington.*—*High v. Emerson*, 23 Wash. 103, 62 Pac. 455; *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121; *Erickson v. McNeeley*, 41 Wash. 509, 84 Pac. 3.

*Wisconsin.*—*Mallory v. Mariner*, 15 Wis. 172; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. 1031; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

<sup>17</sup> See *supra*, § 215 et seq.

<sup>18</sup> *United States.*—*Quesnel v. Mussy*, 1 Dall. 449, 1 U. S. (L. ed.) 218.

*Kansas.*—*Sharpe v. Williams*, 41 Kan. 56, 20 Pac. 497.

*Kentucky.*—*Benedict v. Wilhoite*, 80 S. W. 1155.

*Louisiana.*—*Millaudon v. McMicken*, 7 Mart. N. S. 34.

*Maine.*—*McLaine v. Bachelor*, 8 Greenl. 324; *Jenney v. Deleasdernier*, 20 Me. 163.

*New York.*—*Wells v. Evans*, 20 Wend. 251; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628.

*Pennsylvania.*—*Tompkins v. Woodford*, 1 Pa. St. 156.

*South Carolina.*—*Gilliland v. Gasque*, 6 S. C. 406; *Armstrong v. Hurst*, 39 S. C. 498, 18 S. E. 150.

*Texas.*—*Hickey v. Stringer*, 3 Tex. Civ. App. 45, 21 S. W. 716.



sent.<sup>19</sup> Thus an attorney who receives a note for collection is not authorized to enter into an agreement which will release the liability of an indorser;<sup>20</sup> nor can he release one of two joint debtors in consideration of the other giving security for the debt.<sup>1</sup> A bondholder's attorney has no authority as such to waive payment of interest.<sup>2</sup> Nor can an attorney shift the liability of the adverse party by contracting with another to assume it.<sup>3</sup> Nor can he release a judgment,<sup>4</sup> execution,<sup>5</sup> or other lien,<sup>6</sup> excepting where he

*Vermont.*—Carter v. Talcott, 10 Vt. 471.

*Washington.*—Budlong v. Budlong, 31 Wash. 228, 71 Pac. 751.

*Wisconsin.*—Kelly v. Kelly, 86 Wis. 170, 56 N. W. 637.

<sup>19</sup> Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111; Webster v. Stadden, 14 Wis. 277.

<sup>20</sup> Varnum v. Bellamy, 4 McLean 87, 28 Fed. Cas. No. 16,886; Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201; East River Bank v. Kennedy, 9 Bosw. (N. Y.) 544.

<sup>1</sup> Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

<sup>2</sup> Real Estate Trust Co. v. Union Trust Co., 102 Md. 41, 61 Atl. 228.

<sup>3</sup> Cullin-McCurdy Const. Co. v. Vulcan Iron Works, 93 Ark. 342, 124 S. W. 1023.

<sup>4</sup> *Georgia.*—Phillips v. Dobbins, 56 Ga. 617.

*Kansas.*—Rounsaville v. Hazen, 33 Kan. 71, 5 Pac. 422.

*Kentucky.*—Harrow v. Farrow, 7 B. Mon. 126, 45 Am. Dec. 60; D. C. Heath & Co. v. Com., 129 Ky. 835, 113 S. W. 69.

*Louisiana.*—Morgan v. Their Creditors, 19 La. 84.

*Maine.*—Jenney v. Deleardernier, 20 Me. 192; Wilson v. Wadleigh, 36 Me. 496.

*Maryland.*—Fritchey v. Bosley, 56

Md. 94; Horsey v. Chew, 65 Md. 560, 5 Atl. 466.

*New York.*—Beers v. Hendrickson, 45 N. Y. 665.

*Ohio.*—Wilson v. Jennings, 3 Ohio St. 528.

*Pennsylvania.*—Dollar Sav. Bank v. Robb, 4 Brewst. 106; Kirk's Appeal, 87 Pa. St. 243, 30 Am. Rep. 357; Ely v. Lamb, 10 Pa. Co. Ct. 209.

<sup>5</sup> Wilson v. Wadleigh, 36 Me. 496; Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; Union Bank of Tennessee v. Govan, 10 Smedes & M. (Miss.) 333; Benedict v. Smith, 10 Paige (N. Y.) 126; Housenick v. Miller, 93 Pa. St. 514.

*Waiving Inquisition.*—An attorney who has been acting for the defendant up to judgment on which execution is promptly issued is presumed to have authority to waive inquisition, and if the client desires to disavow he must do so within a reasonable time. Where no move to disavow or object has been made for sixteen years, the presumption is conclusive. Kissick v. Hunter, 184 Pa. St. 174, 39 Atl. 83. Compare Hadden v. Clark, 2 Grant Cas. (Pa.) 107.

<sup>6</sup> *Georgia.*—Hirah & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678.

*Maryland.*—Doub v. Barnes, 1 Md. Ch. 127.

*New York.*—Lewis v. Duane, 141 N.

is authorized to do so. In several jurisdictions, however, the satisfaction of a judgment or other lien, and the collection thereof, are within the scope of the authority of the attorney of record in the action or proceeding wherein they were obtained, and no other authority is needed for that purpose;<sup>7</sup> but, even then, the release can only be effective where the full amount is paid<sup>8</sup> in money.<sup>9</sup> So, also, an attorney has no implied power to release the obligation of one who is surety, to his client's prejudice;<sup>10</sup> nor can he extend the time of payment on a note where such extension would have the effect of releasing a surety from liability thereon,<sup>11</sup> nor consent to a new trial, and thereby release the sureties on an appeal bond.<sup>12</sup> An attorney has no right to give up security for the payment of his client's debt, without actual payment or special authority.<sup>13</sup> So, an attorney has no implied au-

Y. 302, 36 N. E. 322, *affirming* 69 Hun 28, 23 N. Y. S. 433; *Van Kannell Revolving Door Co. v. Astor*, 55 Misc. 378, 105 N. Y. S. 683.

*Ohio*.—*Wilson v. Jennings*, 3 Ohio St. 528.

*South Carolina*.—*Ludden & Bates Southern Music House v. Sumter*, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

*Texas*.—*Engelbach v. Simpson*, 12 Tex. Civ. App. 188, 33 S. W. 596.

<sup>7</sup> See *supra*, § 142, and *infra*, § 275. See also *O'Neill v. Douthitt*, 39 Kan. 316, 18 Pac. 199 (decided under Comp. Laws 1885, c. 68, §§ 5, 6); *Levy v. Brown*, 56 Miss. 83; *Read v. French*, 28 N. Y. 285.

<sup>8</sup> See *supra*, § 220.

<sup>9</sup> See *supra*, § 219.

<sup>10</sup> *Kentucky*.—*Harrodsburg Sav. Inst. v. Chinn*, 7 Bush 539; *Givens v. Briscoe*, 3 J. J. Marsh. 532.

*Louisiana*.—*Roberts v. Smith*, 3 La. Ann. 205.

*Mississippi*.—*Union Bank of Tennessee v. Govan*, 10 Smedes & M. 333.

*Nebraska*.—*Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201.

*Pennsylvania*.—*Lowry v. Clark*, 20 Pa. Super. Ct. 357.

*South Carolina*.—*Armstrong v. Hurst*, 39 S. C. 498, 18 S. E. 150; *Ludden, etc., Southern Music House v. Sumter*, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761.

*Texas*.—*Engelbach v. Simpson*, 12 Tex. Civ. App. 188, 33 S. W. 596.

<sup>11</sup> *Roberts v. Smith*, 3 La. Ann. 205.

*Compare Phillips v. Rounds*, 33 Me. 357, wherein it was held that an attorney, appointed to act for a creditor at the disclosure of his debtor, who has given a relief bond, has authority to extend the time for such debtor to make the disclosure, although such extension may have the effect to discharge the surety on the bond.

<sup>12</sup> *Quinn v. Lloyd*, 36 How. Pr. (N. Y.) 378, 5 Abb. Pr. N. S. 281.

<sup>13</sup> *Terhune v. Colton*, 10 N. J. Eq. 21; *Beard v. Westerman*, 32 Ohio St. 29; *Tankersly v. Anderson*, 4 Desaus. (S. C.) 45.

thority to release errors on the record,<sup>14</sup> though he may agree to the correction of a clerical error.<sup>15</sup> The attorney of record cannot, without special authority, execute a valid release to one who is liable over to his client, in order to render him a competent witness.<sup>16</sup> Where a debtor has been taken into custody on an execution against the person, it has been held that the attorney for the plaintiff cannot, without permission from his client, release the debtor from imprisonment,<sup>17</sup> excepting where the execution has been issued for costs, as to which the attorney has a lien.<sup>18</sup> On the other hand, however, it has been held that the plaintiff's attorney has full power to discharge a defendant from arrest upon a *capias ad satisfaciendum*, issued by him, and that the sheriff is bound to receive and obey his instructions.<sup>19</sup> Of course, as to all these matters counsel may be authorized to execute releases,<sup>20</sup> or, having done so without authority, his act may be ratified.<sup>1</sup>

<sup>14</sup> *Forbes v. Hamilton*, Ky. Dec. 89. See also *Hite v. Wilson*, 2 Hen. & M. (Va.) 268.

<sup>15</sup> *Guay v. Andrews*, 8 La. Ann. 141; *Hill v. Bowyer*, 18 Grat. (Va.) 364.

<sup>16</sup> *Alabama*.—*Ball v. State Bank*, 8 Ala. 590, 42 Am. Dec. 649.

*Georgia*.—*McCurdy v. Terry*, 33 Ga. 49.

*Louisiana*.—*Stocking's Succession*, 6 La. Ann. 229; *Weigel's Succession*, 18 La. Ann. 49.

*Maine*.—*York Bank v. Appleton*, 17 Me. 55.

*Massachusetts*.—*Shores v. Caswell*, 13 Metc. 413.

*New York*.—*Bowne v. Hyde*, 6 Barb. 392; *Murray v. House*, 11 Johns. 464.

*South Carolina*.—*Marshall v. Nagel*, 1 Bailey L. 308.

<sup>17</sup> *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; *Bowe v. Campbell*, 63 How. Pr. (N. Y.) 167, 2 Civ. Proc. 232; *Crary v. Turner*, 6 Johns. (N. Y.) 53; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361; *Kellogg v. Gil-*

*bert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Treasurers v. McDowell*, 1 Hill L. (S. C.) 184, 26 Am. Dec. 166.

<sup>18</sup> *Davis v. Bowe*, 54 Super Ct. 520, 25 N. Y. Wkly. Dig. 455, *affirmed* 118 N. Y. 55, 23 N. E. 166.

<sup>19</sup> *Scott v. Seiler*, 5 Watts (Pa.) 235.

An attorney, who receives a demand for collection from a creditor at a distance, without any special instructions, has a discretionary power not to have the debtor committed on the execution, and, if he has been committed, may discharge him from the commitment, if he acts as a man of common prudence would do, from the apparent circumstances of the debtor. *Hopkins v. Willard*, 14 Vt. 474.

<sup>20</sup> *Wishard v. Biddle*, 64 Iowa 526, 21 N. W. 15; *Fritchey v. Bosley*, 56 Md. 94.

<sup>1</sup> See *supra*, §§ 211-214.

§ 228. **Release of Attached Property.** — The general rule is that an attorney has authority to release the property of the debtor from an attachment if it appears to be for the best interest of his client.<sup>2</sup> So an attorney, to whom a claim is intrusted for collection, may authorize the sheriff to take a receipt for the goods attached, and such receipt will discharge the officer from liability for not retaining possession,<sup>3</sup> even though the attorney in so doing was negligent.<sup>4</sup> And an attorney has power to bind his client by the settlement of an attachment involving the dismissal of a bill for an injunction, and a release from liability on the bond.<sup>5</sup> The reason for allowing an attorney such liberty of action with respect to attachments is that such proceedings, being part of the actual litigation, are within the attorney's exclusive control.<sup>6</sup>

<sup>2</sup> *England.*—See *Payne v. Chute*, 1 Rolle 365; *Levi v. Abbot*, 4 Exch. 588.

*United States.*—*Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147.

*Connecticut.*—*Monson v. Hawley*, 30 Conn. 51, 79 Am. Dec. 233.

*Iowa.*—See *Bennett v. Phillips*, 57 Ia. 174, 10 N. W. 328.

*Maine.*—*Jenney v. Delesdernier*, 20 Me. 183; *Benson v. Carr*, 73 Me. 78.

*Massachusetts.*—*Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 75; *Marble v. Jamesville Mfg. Co.*, 163 Mass. 171, 39 N. E. 998.

*Mississippi.*—*Levy v. Brown*, 56 Miss. 83.

*Missouri.*—*Muir v. Orear*, 87 Mo. App. 38. But see *Quarles v. Porter*, 12 Mo. 76.

*Tennessee.*—See *Rice v. O'Keefe*, 6 Heisk. 638.

<sup>3</sup> *Jenney v. Delesdernier*, 20 Me. 183; *Farnham v. Gilman*, 24 Me. 250.

<sup>4</sup> *Jenney v. Delesdernier*, 20 Me. 183.

<sup>5</sup> *Levy v. Brown*, 56 Miss. 83.

<sup>6</sup> *Levy v. Brown*, 56 Miss. 90. And see *infra*, § 246 et seq.

## CHAPTER XII.

### AUTHORITY TO APPEAR FOR LITIGANTS.

#### *In General.*

- § 229. Authority to Appear.
- 230. Authority Presumed.
- 231. Appearance for Co-Parties and Nominal Parties.
- 232. Necessity of Written Authority to Appear.
- 233. Manner of Entering Appearance.

#### *Objection to Appearances.*

- 234. Right to Object.
- 235. Who May Object.
- 236. Manner of Presenting Objections.
- 237. Sufficiency of Objections.
- 238. Time to Object.
- 239. Evidence.
- 240. Requiring Proof of Authority.
- 241. Consequences of Unauthorized Appearance.
- 242. Waiver of Objection.

#### *Effect of Unauthorized Appearance after Judgment.*

- 243. Generally.
- 244. Domestic Judgment.
- 245. Foreign Judgment.

#### *In General.*

§ 229. Authority to Appear. — A duly licensed attorney at law may, by virtue of his office, appear in a court of law, or other tribunal, for the prosecution or defense of causes, or in any other lawful representative capacity<sup>1</sup> if he was retained for that

<sup>1</sup> *United States*.—*Thayer v. Wales*, Ala. 252; *Ashby Brick Co. v. Ely, etc.*, 5 Fish. Pat. Cas. 448, 23 Fed. Cas. No. 13,872. *Dry Goods Co.*, 151 Ala. 272, 44 So. 96.

*Alabama*.—*Withers v. State*, 36 *California*.—*Mahoney v. Middleton*,

purpose,<sup>2</sup> without producing any special proof of authority so to do.<sup>3</sup> His authority will be presumed in the absence of a request therefor,<sup>4</sup> or the entrance of objections thereto.<sup>5</sup> This power has existed for a very long time,<sup>6</sup> but it does not extend to one who has been disbarred.<sup>7</sup>

41 Cal. 41; *Foote v. Richmond*, 42 Cal. 439.

*Missouri*.—*Markey v. Louisiana & M. R. R. Co.*, 185 Mo. 348, 84 S. W. 61.

*North Carolina*.—*Etheridge v. Woodley*, 83 N. C. 11.

*Vermont*.—*Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

To deny a party the right to appear by attorney is at once shutting out from him that source of information, and that exercise of his legal rights, which would enable him to make a just and fair defense to the suit brought against him. *Hightower v. Hawthorn*, *Hempst.* 42, 8 Fed. Cas. No. 6,478b.

An erroneous ruling excluding an attorney from appearing in a cause cannot avail the party for whom said attorney proposed to appear, if accepted to only by said attorney. *Rosenbawm v. McThomas*, 34 Ind. 331.

<sup>2</sup> See *supra*, §§ 133-136. And see also *In re Gray*, 65 L. T. N. S. (Eng.) 743; *Greenlaw v. Pettit*, 87 Tenn. 467, 11 S. W. 357.

The fact that persons were office associates of an attorney and employed by the same employer, does not justify an inference of authority on the part of such attorney to appear for said persons in a suit brought against them. *Thomson v. Patek*, 235 Ill. 341, 85 N. E. 603, *affirming* 138 Ill. App. 418.

<sup>3</sup> *United States*.—*Osborn v. United*

*States Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204; *United States Bank v. Roberts*, 4 Conn. 323, 2 Fed. Cas. No. 934.

*Alabama*.—*Gaines v. Tombeckbee Bank*, Minor 51.

*Iowa*.—*State v. Carothers*, 1 G. Greene 464.

*Maine*.—*Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Upham v. Bradley*, 17 Me. 423.

*Maryland*.—*Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300.

*Michigan*.—*Farmers, etc., Bank v. Troy City Bank*, 1 Doug. 457.

*Mississippi*.—*Hardin v. Ho-yo-ponubby*, 27 Miss. 567.

*Missouri*.—*Davis v. Cohn*, 96 Mo. App. 587, 70 S. W. 727.

*Pennsylvania*.—*Lynch v. Com.*, 16 Serg. & R. 368, 16 Am. Dec. 582; *Campbell v. Galbreath*, 5 Watts 423.

<sup>4</sup> See *infra*, § 230.

<sup>5</sup> See *infra*, §§ 234-242.

<sup>6</sup> *Ancient statutes*, whereof the first was Statute Westm. 2, c. 10, empowered attorneys to prosecute or defend an action in the absence of the parties to the suit. 3 Blackstone's Com., 25; *Thompson v. Blackhurst*, 1 N. & M. 271, 28 E. C. L. 316; *Vincent v. Bodundo*, 2 Keb. (Eng.) 199.

At the early common law every suitor was obliged to appear in person. 3 Blackstone's Com. 25.

<sup>7</sup> *Cobb v. Judge*, 43 Mich. 289, 5 N. W. 309.

§ 230. **Authority Presumed.**—The universal rule is, that where an attorney appears and undertakes to act for another in a capacity, and for a purpose, within the scope of the ordinary powers of a duly licensed practitioner, his authority to so act will be presumed,<sup>6</sup> and in the absence of a sufficient showing to the con-

\* *United States.*—*Mills v. Duryee*, 7 Cranch 481, 3 U. S. (L. ed.) 411; *Osborn v. U. S. Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204; *Shelton v. Tiffin*, 6 How. 163, 12 U. S. (L. ed.) 387; *Hill v. Mendenhall*, 21 Wall. 453, 22 U. S. (L. ed.) 616; *Bonnifield v. Thorp*, 71 Fed. 924; *In re Gasser*, 104 Fed. 537; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125 *reversing* 127 Fed. 387; *Aaron v. U. S.*, 155 Fed. 833, 84 C. C. A. 67; *Underfeed Stoker Co. v. American Ship Windlass Co.*, 165 Fed. 65.

*Alabama.*—*Cain v. Sullivan, Minor* 31; *Stubbs v. Leavitt*, 30 Ala. 352; *Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 So. 786; *Doe v. Abbott*, 152 Ala. 243, 44 So. 637.

*Arizona.*—*Clark v. Morrison*, 5 Ariz. 349, 52 Pac. 985.

*Arkansas.*—*Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737; *Wyatt v. Burr*, 25 Ark. 476; *State v. Baxter*, 38 Ark. 462; *Broadway v. Sidway*, 84 Ark. 527, 107 S. W. 163.

*California.*—*Turner v. Caruthers*, 17 Cal. 431; *Hayes v. Shattuck*, 21 Cal. 51; *Ricketson v. Torres*, 23 Cal. 636; *People v. Mariposa Co.*, 39 Cal. 683; *Garrison v. McGowan*, 48 Cal. 592; *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Hunter v. Bryant*, 98 Cal. 248, 33 Pac. 51; *San Francisco Sav. Union v. Long*, 123 Cal. 107, 55 Pac. 708, *reversing* 53 Pac. 907; *Pacific Paving Co. v. Vizelech*, 141 Cal. 4, 74 Pac. 352;

*People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329; *In re Meade*, 49 Pac. 5.

*Delaware.*—*Strattner v. Wilmington City Electric Co.*, 3 Penn. 453, 53 Atl. 436.

*Georgia.*—*Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Dobbins v. Dupree*, 39 Ga. 394; *Cassels v. Usry*, 51 Ga. 621; *Alexander v. State*, 56 Ga. 478; *Saffold v. Foster*, 74 Ga. 751; *Hirsch v. Fleming*, 77 Ga. 594, 3 S. E. 9; *Planters', etc., Mut. F. Assoc. v. De Loach*, 113 Ga. 802, 39 S. E. 466; *Bigham v. Kietler*, 114 Ga. 453, 40 S. E. 303.

*Hawaii.*—*Oliveira v. Silva*, 18 Hawaii 602.

*Illinois.*—*Ransom v. Jones*, 1 Scam. 291; *Lawrence v. Jarvis*, 32 Ill. 304; *Reed v. Curry*, 35 Ill. 536; *Williams v. Butler*, 35 Ill. 544; *Harris v. Galbraith*, 43 Ill. 309; *Kenyon v. Shreck*, 52 Ill. 382; *Martin v. Judd*, 60 Ill. 78; *Leslie v. Fischer*, 62 Ill. 118; *School Directors v. School Trustees*, 66 Ill. 247; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118, *affirming* 55 Ill. App. 218; *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, 54 N. E. 211, *affirming* 80 Ill. App. 54; *Thompson v. Hemenway*, 218 Ill. 46, 75 N. E. 791, 109 Am. St. Rep. 239; *People v. Parker*, 231 Ill. 478, 83 N. E. 282, *affirming* 126 Ill. App. 538; *Howard v. Burke*, 248 Ill. 224, 93 N. E. 775, 140 Am. St. Rep. 159; *Patterson v. Northern Trust Co.*, 132 Ill.

App. 208, *affirmed* 230 Ill. 334, 82 N. E. 837, and 231 Ill. 22, 82 N. E. 840.

*Indiana*.—*Doe v. Brown*, 8 Blackf. 443; *Indiana, etc., R. Co. v. Maddy*, 103 Ind. 200, 2 N. E. 574; *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197, 31 N. E. 800.

*Iowa*.—*State v. Carothers*, 1 G. Greene 464; *Savery v. Savery*, 8 Iowa 217; *Harshey v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Reid v. Dickinson*, 37 Iowa 56; *Wheeler v. Cox*, 56 Iowa 36, 8 N. W. 688; *Ellis v. White*, 61 Iowa 644, 17 N. W. 28; *Uehlein v. Burk*, 119 Iowa 742, 94 N. W. 243; *Lake City Electric Light Co. v. McCrary*, 132 Iowa 624, 110 N. W. 19.

*Kansas*.—*Hendrix v. Fuller*, 7 Kan. 331; *Esley v. People*, 23 Kan. 510; *Neosha County v. Leahy*, 24 Kan. 60; *Kerr v. Reece*, 27 Kan. 469; *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

*Kentucky*.—*Anderson v. Sutton*, 2 Duv. 481; *Handley v. Stateljor*, Litt. Sel. Cas. 186; *Noble v. State Bank*, 3 A. K. Marsh. 263; *Duff v. Combs*, 132 Ky. 710, 117 S. W. 259; *Howe v. Anderson*, 14 S. W. 216; *Durrett v. Durrett*, 89 S. W. 210; *Louisville, St. L. & T. R. Co. v. Newsome*, 13 Ky. L. Rep. 174.

*Louisiana*.—*Dangerfield v. Thurstont*, 8 Mart. (N. S.) 234; *Tipton v. Mayfield*, 10 La. 180; *Hempkin v. Bowmar*, 16 La. 363; *Bonnefoy v. Landry*, 4 Rob. 23; *Conrey v. Brenham*, 1 La. Ann. 307; *Campbell v. Arcenaux*, 3 La. Ann. 558; *Barnes v. Proflet*, 5 La. Ann. 117; *Maguire v. Bass*, 8 La. Ann. 270; *Walworth v. Henderson*, 9 La. Ann. 339; *Patrick's Succession*, 20 La. Ann. 204; *Mas-sieu's Succession*, 24 La. Ann. 237; *Dockham v. Potter*, 27 La. Ann. 73; *Postal Tel. Cable Co. v. Louisville, N.*

*O. & T. R. Co.*, 43 La. Ann. 522, 9 So. 119; *Bender v. McDowell*, 46 La. Ann. 393, 15 So. 21; *New Orleans v. Steinhart*, 52 La. Ann. 1043, 27 So. 586.

*Maine*.—*Knowlton v. Plantation No. 4*, 14 Me. 24; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Bridgton v. Bennett*, 23 Me. 420; *Flint v. Comly*, 95 Me. 251, 49 Atl. 1044.

*Maryland*.—*Munnikuyson v. Dorsett*, 2 Har. & G. 374; *Harding v. Hull*, 5 Har. & J. 478; *Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300; *African Methodist Bethel Church v. Carmach*, 2 Md. Ch. 143; *Kent v. Ricards*, 3 Md. Ch. 392; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Fritchey v. Bosley*, 56 Md. 94; *Hager v. Cochran*, 66 Md. 253, 7 Atl. 462; *Kelso v. Stigar*, 75 Md. 405, 24 Atl. 18; *Albert v. Albert*, 78 Md. 338, 23 Atl. 389.

*Massachusetts*.—*Fineran v. Leonard*, 7 Allen 54, 83 Am. Dec. 665; *Lewis v. Sumner*, 13 Metc. 269; *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137; *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938.

*Michigan*.—*Farmers', etc., Bank v. Troy City Bank*, 1 Doug. 457; *Wilcox v. Kassick*, 2 Mich. 165; *O'Flynn v. Eagle*, 7 Mich. 306; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481; *Corbitt v. Timmerman*, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Hirsh v. Fisher*, 138 Mich. 95, 101 N. W. 48.

*Minnesota*.—*Masterson v. LeClaire*, 4 Minn. 163; *Gemmell v. Rice*, 13 Minn. 400.

*Mississippi*.—*Hemphill v. Hemphill*, 34 Miss. 69; *Byrne v. Jeffries*, 38 Miss. 533; *Schirling v. Seites*, 41 Miss. 644; *Lester v. Watkins*, 41 Miss. 647.



*Missouri*.—Baker v. Stonebraker, 34 Mo. 175; Valle v. Picton, 91 Mo. 207, 3 S. W. 860, 16 Mo. App. 178; Cochran v. Thomas, 131 Mo. 278, 33 S. W. 6; State v. Muench, 230 Mo. 236, 130 S. W. 282; Miller v. Continental Assur. Co. of America, 233 Mo. 91, Ann. Cas. 1912C 102, 134 S. W. 1003; Dexter Imp. Assoc. v. Dexter Christian College, 234 Mo. 715, 138 S. W. 40; Ring v. Charles Vogel Paint, etc., Co. 46 Mo. App. 374; Barkley Cemetery Assoc. v. McCune, 119 Mo. App. 349, 95 S. W. 295; Mignogna v. Chiaffarelli, 151 Mo. App. 359, 131 S. W. 769; Riley v. O'Kelly, 157 S. W. 566.

*Nebraska*.—Kepley v. Irwin, 14 Neb. 300, 15 N. W. 719; Vorce v. Page, 28 Neb. 294, 44 N. W. 452; Connell v. Galligher, 36 Neb. 749, 55 N. W. 229; Missouri Pac. R. Co. v. Fox, 56 Neb. 746, 77 N. W. 130; Ebel v. Stringer, 73 Neb. 249, 102 N. W. 466.

*Nevada*.—State v. California Min. Co., 13 Nev. 203; Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

*New Hampshire*.—Leavitt v. Wallace, 12 N. H. 489; Beckley v. Newcomb, 24 N. H. 359; Manchester Bank v. Fellows, 28 N. H. 302.

*New Jersey*.—Norris v. Douglass, 5 N. J. L. 817; Gifford v. Thorn, 9 N. J. Eq. 702; Ward v. Price, 25 N. J. L. 225; Easton & A. R. Co. v. Greenwich Tp., 25 N. J. Eq. 565; Dey v. Hathaway Printing, Telegraph & Telephone Co., 41 N. J. Eq. 419, 4 Atl. 675; Mutual Life Ins. Co. v. Pinner, 43 N. J. Eq. 52, 10 Atl. 184; State v. Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

*New York*.—Jackson v. Stewart, 6 Johns. 34; Denton v. Noyes, 6 Johns. 296, 5 Am. Dec. 237; Bank Comr's. Attys. at L. Vol. I.—27.

v. Buffalo, 6 Paige 497; McGarry v. Board of Supervisors, 1 Sweeny 217; Bogardus v. Livingston, 2 Hilt. 236; Silkman v. Boiger, 4 E. D. Smith 236; Post v. Haight, 1 How. Pr. 171; Middletown Bank v. Huntington, 13 Abb. Pr. 402; Mexico v. De Arangoiz, 5 Duer 643, 1 Abb. Pr. 437; Hamilton v. Wright, 37 N. Y. 502; Brown v. Nichols, 42 N. Y. 26; Rickey v. Christie, 40 Hun 278; Briggs v. Gardner, 60 Hun 543, 15 N. Y. S. 335; People v. Lamb, 85 Hun 171, 32 N. Y. S. 584; Cutting v. Jessmer, 101 App. Div. 283, 15 N. Y. Ann. Cas. 423, 91 N. Y. S. 658; International Harvester Co. v. Champlin, 154 App. Div. 917, 140 N. Y. S. 842; People v. Murray, 2 Misc. 152, 23 Civ. Pro. 71, 23 N. Y. S. 160; Park v. Regan, 55 Misc. 235, 105 N. Y. S. 253; Howard v. Smith, 33 Super. Ct. 124; Austen v. Columbia Lubricants Co., 85 N. Y. S. 362.

*North Carolina*.—England v. Garner, 90 N. C. 197.

*North Dakota*.—Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L.R.A. (N.S.) 244.

*Ohio*.—Sleeper v. Sleeper, 1 Handy 531; Talliaferro v. Porter, Wright 611; Richards v. Skiff, 8 Ohio St. 586; Pillsbury v. Dugan, 9 Ohio 117, 34 Am. Dec. 427.

*Oklahoma*.—Houghton, etc., Mercantile Co. v. Dymont, 2 Okla. 365, 37 Pac. 1052.

*Pennsylvania*.—McCullough v. Guetner, 1 Binn. 214; Betz v. Valer, 15 Phila. 324, 39 Leg. Int. 190; Cyphert v. McClune, 22 Pa. St. 195; Miller v. Preston, 154 Pa. St. 63, 25 Atl. 1041; Danville, etc., R. Co. v. Rhodes, 180 Pa. St. 157, 36 Atl. 648; Munley v. Sugar Notch Borough, 215 Pa. St. 228, 64 Atl. 377; Kemerrer v. Markle,

trary,<sup>9</sup> the adverse party, having no notice or ground of suspicion, may act on that presumption.<sup>10</sup> The rule applies to a special as well as to a general appearance.<sup>11</sup> So, after recovery of judgment the attorney who procured it, or another attorney, may appear and act for the judgment creditor in ulterior proceedings, and the court will presume that he is authorized to so act, in the absence

14 Pa. Co. Ct. 493, 7 Kulp. 262, 3 Pa. Dist. Ct. 652.

*South Carolina*.—*Sanders v. Price*, 56 S. C. 1, 33 S. E. 731.

*South Dakota*.—*Dalbkmeyer v. Scholtes*, 3 S. D. 183, 52 N. W. 871; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *Anderson v. Hultman*, 12 S. D. 105, 80 N. W. 165.

*Tennessee*.—*Rogers v. Park*, 4 Humph. 480; *Foster v. Blount*, 1 Overt. 343.

*Texas*.—*Merritt v. Clow*, 2 Tex. 582; *Fowler v. Morrill*, 8 Tex. 153; *Williams v. Nolan*, 58 Tex. 708; *Holder v. State*, 35 Tex. Crim. 19, 29 S. W. 703; *Bonnell v. Prince*, 11 Tex. Civ. App. 390, 32 S. W. 855; *McBurnett v. Lampkin*, 45 Tex. Civ. App. 567, 101 S. W. 864; *Brasfield v. Young*, 153 S. W. 180.

*Vermont*.—*Proprietors of Eight Thousand Acre Tract v. Bishop*, 2 Vt. 231.

*Virginia*.—*Wilson v. Smith*, 22 Gratt. 494; *Fisher v. March*, 26 Gratt. 765; *Marrow v. Brinkley*, 85 Va. 59, 6 S. E. 605.

*West Virginia*.—*Low v. Settle*, 22 W. Va. 387; *Chilhowie Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128.

*Wisconsin*.—*Shroudenbeck v. Phoenix F. Ins. Co.*, 15 Wis. 632; *Thomas v. Steele*, 22 Wis. 207; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243.

*In courts of justice of the peace of*

*New York* it was formerly held that no attorneys were authorized to appear as such without proof of their authority. *Andrews v. Long*, 19 Hun 303; *Sperry v. Reynolds*, 65 N. Y. 179. But such a requirement was dispensed with by statute in 1882. *Austen v. Columbia Lubricants Co.*, 85 N. Y. S. 362.

An attorney's license is *prima facie* evidence of his authority to appear for a client in a given case upon his statement that he represents such client, so as to require one claiming the contrary to show facts tending to show want of authority, so that where an attorney stated to the court upon inquiry that he represented defendant, it was error to permit the attorney to be further interrogated as to his authority or prevent him from appearing until the objecting party made a sworn statement of facts tending to overcome the *prima facie* evidence of the attorney's authority. *Pekin Stave & Mfg. Co. v. Ramey*, 104 Ark. 1, 147 S. W. 83.

<sup>9</sup> See *infra*, §§ 234-242.

<sup>10</sup> *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18; *Hamilton v. Wright*, 37 N. Y. 502; *Talliaferro v. Porter*, *Wright (Ohio)* 610.

<sup>11</sup> *Cutting v. Jessmer*, 101 App. Div. 283, 15 N. Y. Ann. Cas. 423, 91 N. Y. S. 658.

of any showing to the contrary.<sup>12</sup> Nor does the fact that the attorney abandoned the cause before it came to trial, prevent a decree rendered therein in favor of the defendant from being *prima facie* binding upon the party in whose behalf the suit was filed.<sup>13</sup> The authority of an attorney to represent a party has been presumed from the filing of pleadings,<sup>14</sup> and from the possession of written instruments upon which suit has been brought.<sup>15</sup> So, an attorney who has appeared at previous stages in a bankruptcy proceeding, and who enters his appearance in opposition to the discharge of a bankrupt, is presumed to be duly authorized.<sup>16</sup> It is immaterial whether the litigant for whom the attorney appears is a natural, or an artificial person,<sup>17</sup> or even though it is a state,<sup>18</sup> or a municipality,<sup>19</sup> or a nonresident,<sup>20</sup> or an infant,<sup>1</sup> or one suing as a public officer,<sup>2</sup> or even though the suit be entered by one person to the use of another,<sup>3</sup> or whether the appearance is for several persons.<sup>4</sup> Where an attorney enters his general appearance

<sup>12</sup> *Woodbury v. Nevada So. R. Co.*, 120 Cal. 367, 52 Pac. 650; *Nelson v. Jenks*, 51 Minn. 108, 52 N. W. 1081. See however *Wulff v. Wulff*, 74 Misc. 213, 133 N. Y. S. 807, to the contrary.

<sup>13</sup> *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303.

<sup>14</sup> *Martin v. Walker*, Abb. Adm. 579, 16 Fed. Cas. No. 9,170; *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. 803, 48 U. S. App. 575, 28 C. C. A. 96; *Clark v. Morrison*, 5 Ariz. 349, 52 Pac. 985; *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243; *Flint v. Comly*, 95 Me. 251, 49 Atl. 1044; *Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845.

<sup>15</sup> *Reed v. Curry*, 35 Ill. 536; *Harris v. Galbraith*, 43 Ill. 309; *Etie v. Cade*, 4 La. 383.

<sup>16</sup> *In re Gasser*, 104 Fed. 537, 44 C. C. A. 20.

<sup>17</sup> *Osborn v. United States Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204; *People v. Barnett Tp.* 100 Ill. 332; *African Methodist Bethel Church v. Carmack*, 2 Md. Ch. 143; *Manchester*

*Bank v. Fellows*, 28 N. H. 302; *Proprietors of Eight Thousand Acre Tract v. Bishop*, 2 Vt. 231; *Schroudenbeck v. Phoenix Fire Ins. Co.*, 15 Wis. 632.

<sup>18</sup> *McCauley v. State*, 21 Md. 556; *State v. California Min. Co.*, 13 Nev. 203.

<sup>19</sup> *Delhi v. Graham*, 3 Hun (N. Y.) 407.

<sup>20</sup> *Flint v. Comly*, 95 Me. 251, 49 Atl. 1044.

<sup>1</sup> *Hilliard v. Carr*, 6 Ala. 557.

<sup>2</sup> *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682.

<sup>3</sup> But see *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93, wherein it was held: "That the suit is prosecuted for the use of another in whose derivation of right to the demand there is a manifest defect, is presumption which ought to put the attorney to show his authority." *Hager v. Cochran*, 66 Md. 253, 7 Atl. 462.

<sup>4</sup> *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109.

for the defendants in an action against a partnership, it will be construed as an appearance for the purpose of defending the firm, and not as an appearance for the partners individually.<sup>6</sup> The fact that an attorney, in argument, declined to answer a question as to his authority does not rebut the presumption.<sup>6</sup> The presumption, however, is not conclusive,<sup>7</sup> nor is it applicable to an appearance entered by one who is not an attorney at law.<sup>8</sup>

**§ 231. Appearance for Co-Parties and Nominal Parties.**—Where there are several parties, plaintiff or defendant, one of such parties may authorize an attorney to enter an appearance for all,<sup>9</sup> providing they have been duly served with process.<sup>10</sup> Thus one tenant in common can sue in the names of his co-tenants with or without their consent; and in an action by some of the tenants in common for trespass, their attorney cannot be compelled to prove his authority for adding the name of the others as parties to the action.<sup>11</sup> Where several parties join in a suit by their solicitor, his authority will be presumed<sup>12</sup> unless some of such parties

<sup>6</sup> *Phelps v. Brewer*, 9 Cush. (Mass.) 390, 57 Am. Dec. 56.

<sup>6</sup> *Andrews v. Thayer*, 30 Wis. 228.

<sup>7</sup> *United States v. Standefer*, 209, 22 Fed. Cas. No. 13,284a.

*Alabama*.—*Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185.

*California*.—*People v. Western Meat Co.*, 13 Cal. App. 530, 110 Pac. 338.

*Colorado*.—*Great West Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

*Georgia*.—*Dobbins v. Dupree*, 39 Ga. 394; *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303.

*Louisiana*.—*Roselius v. Delachaise*, 5 La. Ann. 481, 52 Am. Dec. 597; *Dockham v. Potter*, 27 La. Ann. 73.

*Massachusetts*.—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356; *Smith v. Bowditch*, 7 Pick. 137.

*Missouri*.—*Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845.

<sup>8</sup> *Stevens v. Fuller*, 55 N. H. 443; *Fowler v. Morrill*, 8 Tex. 153.

<sup>9</sup> *Lockwood v. Mills*, 39 Ill. 602; *Scott v. Larkin*, 13 Vt. 112; *Spaulding v. Swift*, 18 Vt. 214; *Abbott v. Dutton*, 44 Vt. 551, 8 Am. Rep. 394. See also *Hirsh v. Fisher*, 138 Mich. 95, 101 N. W. 48, 11 Detroit Leg. N. 483.

<sup>10</sup> *Cox v. Hill*, 3 Ohio 411; *Whitney v. Silver*, 22 Vt. 634; *Abbott v. Dutton*, 44 Vt. 551, 8 Am. Rep. 394.

<sup>11</sup> *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

<sup>12</sup> *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Bank Comr's v. Buffalo Bank*, 6 Paige (N. Y.) 497.

Where one defendant sends the summons to another, who is also a defendant, and takes no further notice of the case, it will be conclusively presumed, that the other had authority to employ counsel to represent him. *Wag-*

object to the proceedings,<sup>13</sup> or an adverse party shows affirmatively that the suit is unauthorized as to some of the plaintiffs.<sup>14</sup> So, where a pleading or demurrer is interposed by counsel for "the defendants," it will be presumed that such counsel are acting for all the defendants.<sup>15</sup>

A warrant of attorney signed by the purchaser of a note in the name of the payee is sufficient authority for the attorney to appear in an action on the note, though the purchaser have no written authority so to sign.<sup>16</sup> So, a power of attorney to prosecute a suit executed by a nominal plaintiff is sufficient to authorize the attorney's appearance, where the real party in interest makes no objection.<sup>17</sup> But an attorney for the principal defendants in proceedings by trustee process (suit in the nature of an attachment), has no right to appear *suo motu*, or at the instance of his clients, in behalf of the trustees; nor can he move for the discharge of the trustees upon their disclosure.<sup>18</sup>

**§ 232. Necessity of Written Authority to Appear.**—It has been said that every attorney, before he brings an action, ought to take a written direction from his client for commencing it.<sup>19</sup> It is well settled, however, that there is no necessity of having written authority to enter an appearance<sup>20</sup> unless required by statute.

*ener v. Swygert*, 30 S. C. 206, 9 S. E. 107.

<sup>13</sup> *Bank Comr's v. Buffalo Bank*, 6 Paige (N. Y.) 497.

<sup>14</sup> *Bank Comr's v. Buffalo Bank*, 6 Paige (N. Y.) 497.

<sup>15</sup> *Adams v. Mowry*, 6 Mo. App. 582.

<sup>16</sup> *Johnson v. Sikes*, 49 N. C. 70.

<sup>17</sup> *Culver v. Barney*, 14 Wend. (N. Y.) 161. Compare *Mississippi Cent. R. Co. v. Southern R. Assoc.*, 8 Phila. (Pa.) 107, wherein it was said that where the warrant of an attorney is not executed by the legal plaintiffs, but by the executors of a decedent to whose use the suit is marked, the equitable plaintiffs must show their authority to use the name of the legal plaintiffs.

<sup>18</sup> *Jacobs v. Copeland*, 54 Me. 503.

<sup>19</sup> *Owen v. Ord*, 3 C. & P. 349, 14 E. C. L. 342, wherein Tenterden, C. J., said that an attorney ought to take such a writing "both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it also would be better for a great many clients, as it would put them on their guard, and prevent them from being drawn into law-suits without their own express direction."

<sup>20</sup> *United States*.—*U. S. Bank v. Roberts*, 4 Conn. 323, 2 Fed. Cas. No. 934.

*Alabama*.—*Gaines v. Tombeckbee*

This applies as well to an appearance for corporations as to that for natural persons.<sup>1</sup> A similar rule has been stated heretofore with respect to the necessity of a written retainer.<sup>2</sup>

§ 233. **Manner of Entering Appearance.**—In courts of record the actual appearance is always effected by a writing of some kind. Where the common-law system of practice prevails an action is instituted by the filing of a *præcipe*, signed by the plaintiff's attorney, directing the issuance of the original writ, and the defendant's attorney appears either by entering his name on the docket or by giving the clerk (sometimes called a prothonotary) a written direction to do so. Where code systems prevail the

*Bank*, Minor 50; *Lucas v. Georgia Bank*, 2 Stew. 147.

*California*.—*Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352.

*Delaware*.—*State v. Houston*, 3 Har. 20.

*Illinois*.—*Leslie v. Fisher*, 62 Ill. 118.

*Indiana*.—*Dougherty v. Andrews*, 19 Ind. 406.

*Kentucky*.—*McAlexander v. Wright*, 3 T. B. Mon. 189, 16 Am. Dec. 93.

*Maine*.—*Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Bridgton v. Bennett*, 23 Me. 420.

*Maryland*.—*Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300.

*Massachusetts*.—*Field v. Common, etc., Land*, 1 Cush. 11.

*Michigan*.—*Farmers', etc., Bank v. Troy City Bank*, 1 Doug. 457; *O'Flynn v. Eagle*, 7 Mich. 306.

*Minnesota*.—*Farrington v. Wright*, 1 Minn. 241.

*Mississippi*.—*McKiernan v. Patrick*, 4 How. 335; *Hardin v. Ho-yo-ponubby*, 27 Miss. 567; *Schirling v. Scites*, 41 Miss. 644.

*Missouri*.—*State v. Crumb*, 157 Mo. 545, 57 S. W. 1030.

*New Hampshire*.—*Manchester Bank*

*v. Fellows*, 28 N. H. 302; *Stevens v. Fuller*, 55 N. H. 443; *Bodge v. Butler*, 57 N. H. 204.

*New Jersey*.—*Bowlsby v. Johnston*, 13 N. J. L. 349.

*New York*.—*Howard v. Howard*, 11 How. Pr. 80; *Hirshfield v. Landman*, 3 E. D. Smith 208; *Silkman v. Boiger*, 4 E. D. Smith 236; *People v. Murray*, 23 Civ. Pro. 71, 33 N. Y. S. 160, affirmed 138 N. Y. 635, 33 N. E. 1084.

*North Carolina*.—*Johnson v. Sikes*, 49 N. C. 70.

*Pennsylvania*.—*Lynch v. Com.*, 16 Serg. & R. 368, 16 Am. Dec. 582; *Danville, etc., R. Co. v. Rhodes*, 180 Pa. St. 157, 36 Atl. 648; *Com. v. Serfass*, 5 Pa. Co. Ct. 139.

*South Carolina*.—*Hellman v. McWhennie*, 3 Rich. L. 364.

*Wisconsin*.—*Walker v. Rogan*, 1 Wis. 597.

<sup>1</sup>*Osborn v. U. S. Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204; *Manchester Bank v. Fellows*, 28 N. H. 302; *Proprietors of Eight Thousand Acre Tract v. Bishop*, 2 Vt. 231. See also *Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197, 31 N. E. 800.

<sup>2</sup>See *supra*, § 135.

suit is usually instituted by a summons signed by the plaintiff's attorney, and to this the attorney for the defendant usually answers by a written notice of retainer or the filing of an answer. In courts not of record appearances are usually effected by appearing in person, though there may be occasions where the experienced practitioner will see the wisdom of filing a written appearance or notice of retainer, as, for instance, where the magistrate is not disposed to be fair with his client.

*Objection to Appearances.*

§ 234. **Right to Object.** — The right to be employed and appear is one thing; the fact of being actually employed is another matter,<sup>3</sup> and irrespective of the presumption of authority to appear mentioned in a preceding section,<sup>4</sup> a party may require the attorney representing his adversary to show his authority; this right is essential to the security of all suitors, and its existence cannot be denied.<sup>5</sup> Of course, the fact that an attorney appears for a party is *prima facie* evidence of his authority to do so,<sup>6</sup> and the fact that warrants of attorney have been seldom called for is loud testimony in favor of the integrity of the profession;<sup>7</sup> nevertheless in every case where there is reasonable ground to apprehend that an attorney is proceeding without the permission of the individual whom he alleges to represent on the record, he should be required to show his authority when it is properly questioned.<sup>8</sup> He is not authorized to appear whether employed or not, or to ap-

<sup>3</sup> *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

The court may, in a proper case, make an order requiring the attorney for plaintiff to furnish defendant with plaintiff's residence and address. *Vincent v. Vanderbilt*, 10 How. Pr. (N. Y.) 324; *Corbett v. De Comeau*, 45 Super. Ct. (N. Y.) 637; *Corbett v. Gibson*, 18 Hun (N. Y.) 49; *Post v. Schneider*, 59 Hun 619 mem., 13 N. Y. S. 396. *Walton v. Fairchild*, 4 N. Y. S. 552. See also *supra*, § 124.

<sup>4</sup> See *supra*, § 230.

<sup>5</sup> *Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737.

*It is error* for a court to permit an attorney to appear for a party without proof of authority, but the error is cured by subsequent proof thereof during the trial. *Ford v. Smith*, 1 Wend. (N. Y.) 49.

<sup>6</sup> *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

<sup>7</sup> *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189.

<sup>8</sup> *United States.—King of Spain v.*

pear for anyone at the instance of a stranger who may have no legal or equitable interest in the cause.<sup>9</sup> There can scarcely be a more gross violation of the duty of an attorney than knowingly and wilfully to appear for and represent a party to an action without authority.<sup>10</sup>

§ 235. **Who May Object.**—An objection to an unauthorized appearance may, of course, be made by the party for whom it was entered.<sup>11</sup> So, also, the adverse party may present an objection,<sup>12</sup>

Oliver, 2 Wash. 429, 14 Fed. Cas. No. 7,814.

*Arkansas.*—Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Cartwell v. Menifee, 2 Ark. 356.

*California.*—San Francisco Sav. Union v. Long, 123 Cal. 107, 55 Pac. 708, reversing 53 Pac. 907.

*Colorado.*—Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806; Colorado Coal, etc., Co. v. Carpita, 6 Colo. App. 248, 40 Pac. 248.

*Delaware.*—State v. Houston, 3 Har. 15.

*Georgia.*—Ga. Code (1911), sec. 4961.

*Kentucky.*—Belt v. Wilson, 6 J. J. Marsh. 495, 22 Am. Dec. 88.

*Louisiana.*—Roselius v. Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597.

*Minnesota.*—Farrington v. Wright, 1 Minn. 241.

*Mississippi.*—McKiernan v. Patrick, 4 How. 333.

*New York.*—Excise Com'rs v. Purdy, 36 Barb. 266; Ninety-nine Plaintiffs v. Vanderbilt, 4 Duer 632; Hirshfield v. Landman, 3 E. D. Smith 208; Hollins v. St. Louis & Chicago R. Co., 57 Hun 139, 11 N. Y. S. 27; Vincent v. Vanderbilt, 10 How. Pr. 324, 1 Abb. Pr. 193.

*Pennsylvania.*—Boutlier v. Johnson, 2 Browne 17.

*South Carolina.*—Allen v. Green, 1 Bailey L. 448.

*Tennessee.*—Rogers v. Park, 4 Humph. 480; *Ex. p.* Gillespie, 3 Yerg. 325.

<sup>9</sup> *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

<sup>10</sup> *San Francisco Sav. Union v. Long*, 123 Cal. 107, 55 Pac. 708, reversing 53 Pac. 907.

<sup>11</sup> *Baldwin v. Foss*, 14 Neb. 455, 16 N. W. 480; *White v. Merriam*, 16 Neb. 96, 19 N. W. 703; *Hess v. Cole*, 23 N. J. L. 116; *Hunt v. Brennan*, 1 Hun (N. Y.) 213; *Stewart v. Stewart*, 56 How. Pr. (N. Y.) 256.

<sup>12</sup> *United States.*—*King of Spain v. Oliver*, 2 Wash. 429, 14 Fed. Cas. No. 7,814.

*Arkansas.*—Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; *State v. Baxter*, 38 Ark. 462.

*California.*—*People v. Mariposa Co.*, 39 Cal. 683.

*Colorado.*—*Colorado Coal, etc., Co. v. Carpita*, 6 Colo. App. 248, 40 Pac. 248.

*Iowa.*—*State v. Tilghman*, 6 Iowa 496; *Yockey v. Woodbury County*, 130 Iowa 412, 106 N. W. 950; Code Sec. 320.

*Kentucky.*—*McAlexander v. Wright*, 3 T. B. Mon. 194, 16 Am. Dec. 93.



by showing the requisite facts,<sup>13</sup> and acting in due time;<sup>14</sup> but, without notice, he is not obliged to inquire into and ascertain whether an attorney who enters an appearance for a party is duly authorized to do so.<sup>15</sup> He may rely on the presumption of authority.<sup>16</sup> As a rule, the court will not of its own motion question the authority of an attorney to appear in a cause,<sup>17</sup> nor will the court undertake to decide which of several contending counsel has the better right to control and manage the cause in which they appear.<sup>18</sup> But should the circumstances warrant such action, the court would undoubtedly have the right to act on its own motion, or by the appointment of an *amicus curiæ*, as, for instance, where a fraud was apparent or suggested.<sup>19</sup> A stranger to the record will not be heard to question the attorney's authority,<sup>20</sup> nor will a party who no longer has a litigable interest.<sup>1</sup>

§ 236. Manner of Presenting Objections. — The usual practice is to present an objection to an unauthorized appearance

*Michigan*.—Hirsh v. Fisher, 138 Mich. 95, 101 N. W. 48.

*New York*.—Code Civ. Proc. §§ 1512, 1514, 2890. See also Hollins v. St. Louis, etc., R. Co., 57 Hun 139, 11 N. Y. S. 27; 99 Plaintiffs v. Vanderbilt, 1 Abb. Pr. 193. And see also the cases cited in the preceding section.

<sup>13</sup> See *infra*, § 237.

<sup>14</sup> See *infra*, § 238.

<sup>15</sup> Budd v. Gamble, 13 Fla. 265.

<sup>16</sup> See *supra*, § 230.

<sup>17</sup> Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 48, 20 Pac. 771, 13 Am. St. Rep. 204; Howe v. Anderson, (Ky.) 14 S. W. 216; People v. Murray, 2 Misc. 152, 23 Civ. Pro. 71, 23 N. Y. S. 160.

<sup>18</sup> Eriko v. Bomford, 1 Hayw. & H. (D. C.) 261, 8 Fed. Cas. No. 4,517.

<sup>19</sup> "Doubtless where fraud was suggested, and especially if a minor was concerned and in danger of being injured by an unauthorized proceeding before us, we would for the protection

of either guardian, ward, or defendant, inquire into the attorney's authority." State v. Houston, 3 Har. (Del.) 15.

<sup>20</sup> Pond v. Lockwood, 8 Ala. 669; Hirsch v. Fleming, 77 Ga. 594, 3 S. E. 9; Hookey v. Greenstein, 119 App. Div. 209, 104 N. Y. S. 621; Bryans v. Taylor, Wright (Ohio) 245; Miller v. Continental Assur. Co., 233 Mo. 91, Ann. Cas. 1912C 102, 134 S. W. 1003.

<sup>1</sup> Where no judgment was rendered against certain individual defendants in proceedings for the appointment of a receiver of a corporation from which an appeal would lie, they had no personal interest in an appeal from an order denying a motion to discharge the receiver which would authorize them to contest the authority of the attorneys for the corporation to present a motion to dismiss the appeal. Miller v. Continental Assur. Co., 233 Mo. 91, Ann. Cas. 1912C 102, 134 S. W. 1003.

by motion,<sup>2</sup> or petition,<sup>3</sup> in the court below,<sup>4</sup> based on affidavits showing *prima facie* want of authority.<sup>5</sup> Such motion should seek either to vacate the appearance, to dismiss the action, for an order requiring authority to be shown, or to vacate the judgment where jurisdiction was acquired solely by the appearance of the

<sup>2</sup> *Alabama*.—*Brown v. French*, 159 Ala. 645, 49 So. 255.

*California*.—*Turner v. Caruthers*, 17 Cal. 432; *Clark v. Willett*, 35 Cal. 534.

*Colorado*.—*Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185.

*Georgia*.—*Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7; *Workingmen's Union Assoc. v. Reynolds*, 135 Ga. 5, 68 S. E. 697.

*Illinois*.—*Mix v. People*, 116 Ill. 265, 4 N. E. 783; *Congregation of the Resurrection v. Laibe*, 152 Ill. App. 417.

*Iowa*.—*State v. Beardsley*, 108 Ia. 396, 79 N. W. 138.

*Missouri*.—*Riley v. O'Kelly*, 157 S. W. 566.

*New Jersey*.—*North Brunswick Tp. v. Booraem*, 10 N. J. L. 257.

*New York*.—*People v. Lamb*, 85 Hun 171, 32 N. Y. S. 584; *Excise Com'rs v. Purdy*, 13 Abb. Pr. 434.

*South Carolina*.—*Hellman v. McWhinnie*, 3 Rich. L. 364.

*South Dakota*.—*Mead v. Mead*, 28 S. D. 131, 132 N. W. 701.

*Texas*.—*Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539; *Hess v. Webb*, 113 S. W. 618; *State v. Murphy*, 137 S. W. 708.

<sup>3</sup> *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185.

<sup>4</sup> *Williams v. Butler*, 35 Ill. 544; *Dehn v. Dehn*, 170 Mich. 407, 136 N. W. 453.

<sup>5</sup> *United States*.—*Standefer v. Dowlin*, *Hempst.* 209, 22 Fed. Cas. No. 13,284a; *Bonnifield v. Thorp*, 71 Fed. 924.

*Arkansas*.—*Cartwell v. Menifee*, 2 Ark. 356.

*Illinois*.—*People v. Barnett Tp.*, 100 Ill. 332.

*Louisiana*.—*Dangerfield v. Thurstont*, 8 Mart. N. S. 232; *Hayes v. Cuny*, 9 Mart. 87; *Johnson v. Brandt*, 10 Mart. 638; *Kelly v. Benedict*, 5 Rob. 138, 39 Am. Dec. 530; *Fisher v. Moore*, 12 Rob. 95; *Patrick's Succession*, 20 La. Ann. 204; *Dockham v. Potter*, 27 La. Ann. 73; *Postal Tel. Cable Co. v. Louisville, etc., R. Co.*, 43 La. Ann. 522, 9 So. 119; *New Orleans v. Steinhart*, 52 La. Ann. 1043, 27 So. 586.

*Texas*.—*Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539. And see the section following.

"A certain degree of sanctity attaches to the act of an attorney at law, as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption and put the opposite party to proof. We find no case which goes to the extent of holding that the making of such an affidavit is a condition precedent to the administration of any proof under his plea. We think it was competent for the defendant to be heard." *Bender v. McDowell*, 46 La. Ann. 393, 15 So. 21.

*Who May Make Affidavit*.—When a party repudiates the authority of an attorney at law to have acted for him, it is necessary that his assertion should be supported by his own oath,

attorney.<sup>6</sup> Notice of motion must, of course, be given to the attorney.<sup>7</sup> And in some jurisdictions the time for objection is limited by rule.<sup>8</sup> Allegations on information and belief that the suit was instituted without authority are insufficient to raise the question.<sup>9</sup> An unauthorized appearance cannot be objected to by answer,<sup>10</sup> demurrer,<sup>11</sup> or plea,<sup>12</sup> nor, as a general rule, can it be attacked collaterally.<sup>13</sup> No written answer is required on the part of

and not that of an agent. *Boykin v. Holden*, 6 La. Ann. 120.

<sup>6</sup> *Bonnifield v. Thorp*, 71 Fed. 924.

"*The established practice in this country and England is to apply to the court by petition stating the facts relied on to overcome the presumption [of authority to appear], and asking a rule upon the attorney to file his warrant. When he has complied with the rule by filing a warrant sufficient in form and in the manner of its execution, the rule has been complied with and is *functus officio*. If the warrant is alleged to be defective, or forged, or in any manner insufficient to justify the court in treating it as authority for the appearance of the attorney, the defect should be pointed out by exceptions and its sufficiency passed upon by the court.*" *Danville, etc., R. Co. v. Rhodes*, 180 Pa. St. 157, 159, 36 Atl. 648.

<sup>7</sup> *Beckley v. Newcomb*, 24 N. H. 359; *Nash v. Gilkeson*, 5 Serg. & R. (Pa.) 352.

<sup>8</sup> *Norwood v. Dodge*, (Mass.) 102 N. E. 412.

<sup>9</sup> *United States*.—*Bonnifield v. Thorp*, 71 Fed. 924.

*Illinois*.—*Crane v. Nelson*, 37 Ill. App. 597.

*Louisiana*.—*Gigand v. New Orleans*, 52 La. Ann. 1259, 27 So. 794.

*Missouri*.—*Valle v. Picton*, 16 Mo. App. 178; *Robinson v. Robinson*, 32 Mo. App. 88.

*Compare Excise Com'rs v. Purdy*, 13 Abb. Pr. (N. Y.) 434, wherein it was held that on motion to dismiss an action commenced by an attorney without authority, allegations upon information and belief, in the moving affidavits, as to the want of authority, not contradicted or explained, are to be taken as true.

<sup>10</sup> *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *State v. Beardsley*, 108 Ia. 396, 79 N. W. 138; *Robinson v. Robinson*, 32 Mo. App. 88; *Doolittle v. Gookin*, 10 Vt. 265.

<sup>11</sup> *State v. Baxter*, 38 Ark. 462; *Workingmen's Union Assoc. v. Reynolds*, 135 Ga. 5, 68 S. E. 697; *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *Gibson v. State*, 59 Miss. 341.

<sup>12</sup> *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7; *North Brunswick Tp. v. Booraem*, 10 N. J. L. 257; *Excise Com'rs v. Purdy*, 13 Abb. Pr. (N. Y.) 434.

<sup>13</sup> *United States*.—*Compare Shelton v. Tiffin*, 6 How. 163, 12 U. S. (L. ed.) 387.

*Indiana*.—*Bush v. Bush*, 46 Ind. 70; *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

*Louisiana*.—*Patrick's Succession*, 20 La. Ann. 204.

*Michigan*.—*Corbitt v. Timmerman*, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

the attorney whose right to appear is thus questioned.<sup>11</sup> When the authority of the attorney to appear is questioned and presented to the court for determination, it should, in the nature of things, take precedence of other proceedings, because its determination is essential in order that the court and all parties interested in the suit or proceeding may know whether the acts of the attorney in the particular suit are or are not to be regarded as the acts of the party whom he professes to represent.<sup>12</sup>

§ 237. Sufficiency of Objections. — In order to invoke the exercise of the power of the court to question an attorney's authority to appear, it is necessary to state facts showing or tending to show that the attorney does not possess the authority which he assumes; otherwise the presumption arising from his license and appearance will prevail.<sup>13</sup> The courts will not impose hardships on the profession in their management of suits; nor will they gratify the party to which they are opposed by compelling the production of a warrant of attorney upon light or frivolous grounds; but when substantial reasons are shown why the interest of the adverse party is jeopardized by the prosecution of a suit without the consent of the party for whom the appearance was entered,

*Nevada.*—Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

*New York.*—Donohue v. Hungerford, 1 App. Div. 528, 37 N. Y. S. 628; Hendrick v. Biggar, 66 Misc. 576, 122 N. Y. S. 162. Compare Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589, reversing 7 Hun 25.

*South Carolina.*—Dillard v. Crocker, Speer Eq. 20.

*Texas.*—Hess v. Webb, 113 S. W. 618.

<sup>14</sup> Bridge v. Samuelson, 73 Tex. 522, 11 S. W. 539.

<sup>15</sup> Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.

<sup>16</sup> *California.*—People v. Mariposa Co., 39 Cal. 683.

*Iowa.*—Savery v. Savery, 8 Iowa 217.

*Kentucky.*—McAlexander v. Wright, 3 T. B. Mon. 189, 16 Am. Dec. 93.

*Missouri.*—Valle v. Picton, 91 Mo. 207, 3 S. W. 860.

*New Jersey.*—Dey v. Hathaway Printing, etc., Co., 41 N. J. Eq. 419, 4 Atl. 675.

*Pennsylvania.*—Danville, etc., R. Co. v. Rhodes, 180 Pa. St. 157, 36 Atl. 648, 40 W. N. C. 5.

*South Carolina.*—Hellman v. McWhennie, 3 Rich. L. 364.

*Vermont.*—Doolittle v. Gookin, 10 Vt. 265.

*West Virginia.*—Low v. Settle, 22 W. Va. 387.

every reasonable person will agree that their authority ought to be shown.<sup>17</sup> The facts presented should be sufficient to raise at least a suspicion of fraud,<sup>18</sup> or of an attempt to impose upon a party,<sup>19</sup> or to abuse or pervert the process of the court.<sup>20</sup> An affidavit on

<sup>17</sup> Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

<sup>18</sup> Kelso v. Stigar, 75 Md. 378, 24 Atl. 18; Delhi v. Graham, 3 Hun (N. Y.) 407; Mexico v. De Arangoiz, 5 Duer (N. Y.) 643.

<sup>19</sup> Mexico v. De Arangoiz, 5 Duer (N. Y.) 643.

The adverse party can demand the attorney's authority only where he shows his rights are jeopardized without it, or that he was disturbed by being brought into litigation without the consent of the other party. McAlexander v. Wright, 3 T. B. Mon. (Ky.) 194, 16 Am. Dec. 93.

Where a plaintiff brought suit alleging that he was the assignee of a judgment to enforce the same, and the defendant, in an affidavit, stated that the judgment plaintiff had long since left the country, and had not been heard from, and that he believed him to be dead, and that he had given no authority to anyone to prosecute the suit, and that the person pretending to have an assignment of the judgment, and for whose use the suit was prosecuted, had no title thereto, it was held that the affidavit was sufficient to entitle defendant to a rule to the counsel for plaintiff to show some right in those for whose benefit the suit was brought, either legally or equitably derived from the judgment plaintiff, before the attorney could be permitted to proceed with the suit. McAlexander v. Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

*Nonpayment of License Fee.*—In

Harrington v. Edwards, 17 Wis. 586, 84 Am. Dec. 768, "There was no error in overruling the defendant's objection to the appearance of the plaintiff's attorney, and the motion for a nonsuit made because the attorney had not paid for and procured an attorney's license from the government of the United States. The judge refused to investigate that matter, and he was quite right. It is the duty of the proper officers of the United States to see that the revenue is collected and the penalties for disobedience enforced, and not a matter which thus directly concerns the courts or jurisdictions of the state."

<sup>20</sup> Mexico v. De Arangoiz, 5 Duer (N. Y.) 643; McBurnett v. Lampkin, 45 Tex. Civ. App. 567, 101 S. W. 864; Delhi v. Graham, 3 Hun (N. Y.) 407. In the case last cited the court said: "The defendant moves to stay the plaintiff's proceedings, on the ground that the attorney is not authorized to bring the action. The instances in which such relief is proper, are rare. They should probably be limited to those in which there is an actual fraud on the court; in which an attorney, without the knowledge or consent of a plaintiff, is using his name in a wrongful manner. Generally it is best that only the plaintiff himself should be allowed to complain that the action is without his authority, and that his silence on this point should be considered to give consent."

In Kelso v. Stigar, 75 Md. 378, 24 Atl. 18, it was held that when an at-

information and belief, without stating the grounds of belief, is not sufficient.<sup>1</sup> Of course if the objection is made by the party represented, he need show nothing more than want of authority in the attorney;<sup>2</sup> and even though he had given authority originally, he can apply for a substitution.<sup>3</sup> A motion by the plaintiff to require an attorney appearing for certain defendants to prove his authority is addressed largely to the discretion of the trial court.<sup>4</sup>

**§ 238. Time to Object.** — Where the adverse party desires to question the authority of the attorney who appears for his opponent he should do so promptly,<sup>5</sup> at the earliest opportunity,<sup>6</sup> otherwise he waives his right to object.<sup>7</sup> What shall be deemed to be a sufficient celerity varies in the several jurisdictions, and may depend somewhat on the facts. Thus it has been held that objection should be made before the attorney's right to appear has been recognized by proceedings in the cause,<sup>8</sup> that is, as soon as it becomes known that an appearance has been entered, or at the first term thereafter,<sup>9</sup> and before any action has been taken with knowledge

torney brings a suit, or takes upon himself to appear for a party, the court will not look further, but act upon the presumption that the attorney has authority for his action, unless there has been fraud or imposition practiced, or the party himself has made objection to the use of his name.

<sup>1</sup> *Standefer v. Dowlin*, Hempst. 209, 22 Fed. Cas. No. 13,284a; *Murphy v. Byrd*, Hempst. 211, 17 Fed. Cas. No. 9,947a; *People v. Mariposa Co.*, 39 Cal. 683; *Louisville, etc., R. Co. v. Newsome*, 13 Ky. L. Rep. 174; *Bonnefoy v. Landry*, 4 Rob. (La.) 23; *Campbell v. Arcenaux*, 3 La. Ann. 558; *Watrous v. Kearney*, 79 N. Y. 496; *Wright v. Allen*, 26 Wis. 661.

<sup>2</sup> *Delhi v. Graham*, 3 Hun (N. Y.) 407.

<sup>3</sup> See *supra*, §§ 143-150.

<sup>4</sup> *Beecher v. Henderson*, 4 Ala. App. 543, 58 So. 805.

<sup>5</sup> *State v. Harris*, 14 N. D. 501, 105 N. W. 621.

<sup>6</sup> *Mix v. People*, 116 Ill. 265, 4 N. E. 783.

A defendant has the right to presume that the suit was authoritatively commenced, and hence his motion to dismiss immediately after discovering want of authority, is in time. *Bell v. Farwell*, 189 Ill. 414, 59 N. E. 955, *affirming* 89 Ill. App. 638.

<sup>7</sup> *Doe v. Abbott*, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30; *Louisville, St. L. & T. R. Co. v. Newsome*, 13 Ky. L. Rep. 174; *Simmons v. Jacobs*, 52 Me. 147; *State v. Harris*, 14 N. D. 501, 105 N. W. 621. And see *infra*, § 242.

<sup>8</sup> *Reece v. Reece*, 66 N. C. 377.

<sup>9</sup> *United States*.—*Rogers v. Crommelin*, 1 Cranch (C. C.) 536, 20 Fed. Cas. No. 12,009.

of the appearance; e. g. before the answer,<sup>10</sup> or plea,<sup>11</sup> has been filed. It is certainly too late to object at the trial,<sup>12</sup> after final judgment,<sup>13</sup> or on appeal.<sup>14</sup> The party for whom the appearance has been entered, if without knowledge of that fact, may object at any time on being informed thereof, even after judgment. But a suitor who does not disclaim the authority of an attorney who assumes to represent him in an action after he has acquired knowledge thereof, cannot do so afterwards. He cannot take the hazard of a trial and, when unsuccessful, allege as ground for vacating the judgment that the attorney who conducted the trial had no authority.<sup>15</sup>

*Maine.*—Knowlton v. Plantation No. 4, 14 Me. 20; Prentiss v. Kelly, 41 Me. 436.

*New Hampshire.*—Beckley v. Newcomb, 24 N. H. 359.

*New York.*—Treadwell v. Bruder, 3 E. D. Smith 597; Silkman v. Boiger, 4 E. D. Smith 236.

*North Carolina.*—Reece v. Reece, 66 N. C. 377.

<sup>10</sup> Rowland v. Gardner, 69 N. C. 53,

<sup>11</sup> First Parish in Sutton v. Cole, 3 Pick. (Mass.) 232; Hirshfield v. Landman, 3 E. D. Smith (N. Y.) 208; Mercier v. Mercier, 2 Dall. (Pa.) 142, 1 U. S. (L. ed.) 324; Campbell v. Galbreath, 5 Watts (Pa.) 423; Sheetz v. Whitaker, 7 W. N. C. (Pa.) 570.

<sup>12</sup> *Alabama.*—Doe v. Abbott, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30.

*Colorado.*—Abbott v. Williams, 15 Colo. 512, 25 Pac. 450.

*Indiana.*—Indiana, B. & W. R. Co. v. Maddy, 103 Ind. 200, 2 N. E. 574.

*Michigan.*—Dehn v. Dehn, 170 Mich. 407, 136 N. W. 453.

*New York.*—People v. Lamb, 85 Hun 171, 32 N. Y. S. 584.

*Vermont.*—Spaulding v. Swift, 18 Vt. 214.

<sup>13</sup> *Connecticut.*—Cockran v. Leister, 2 Root 348.

*Illinois.*—Williams v. Butler, 35 Ill. 544.

*Kentucky.*—Noble v. State Bank, 3 A. K. Marsh. 263; Talbot v. McGee, 4 T. B. Mon. 378.

*Missouri.*—Clark v. Holliday, 9 Mo. 711.

*New York.*—Tabor v. Gilflan, 58 Hun 608 mem., 34 N. Y. St. Rep. 628.

*North Dakota.*—Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609.

*Texas.*—Fowler v. Morrill, 8 Tex. 153.

<sup>14</sup> Noble v. State Bank, 3 A. K. Marsh. (Ky.) 262; O'Fynn v. Eagle, 7 Mich. 306; Baldwin v. Foss, 14 Neb. 455, 16 N. W. 480; White v. Merriam, 16 Neb. 96, 19 N. W. 703; McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655, 26 A. S. R. 705.

<sup>15</sup> *Florida.*—Haddock v. Wright, 25 Fla. 202, 5 So. 813.

*Illinois.*—Ruckman v. Allwood, 40 Ill. 128.

*Iowa.*—Harshey v. Blackmarr, 20 Iowa 161, 89 Am. Dec. 520 dictum.

*New York.*—Abbett v. Blohm, 54 App. Div. 422, 66 N. Y. S. 838.

*North Carolina.*—Weaver v. Jones, 82 N. C. 440.

*North Dakota.*—Bacon v. Mitchell,

§ 239. Evidence. — The burden of proof is on the party attacking the attorney's authority to appear,<sup>16</sup> and he must overcome the presumption which attaches to the attorney's official position, otherwise the presumption will prevail.<sup>17</sup> But where the objector makes a *prima facie* showing, it then devolves upon the attorney to prove his authority to the satisfaction of the court.<sup>18</sup> The authority of an attorney to appear may be proved in the same manner as any other fact is proved.<sup>19</sup> A written authority is, of

14 N. D. 454, 106 N. W. 129, 4 L.R.A. (N.S.) 244.

*Pennsylvania*.—*Kemerrer v. Markle*, 14 Pa. Co. Ct. 493.

<sup>16</sup> *United States*.—*Bonnifield v. Thorp*, 71 Fed. 924; *Aaron v. U. S.*, 155 Fed. 833, 84 C. C. A. 67.

*Alabama*.—*Stubbs v. Leavitt*, 30 Ala. 352.

*Arkansas*.—*Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568; *Broadway v. Sidway*, 84 Ark. 527, 107 S. W. 163.

*California*.—*People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338.

*Illinois*.—*Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, 54 N. E. 211.

*Kansas*.—*Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; *Reynolds v. Fleming*, 30 Kan. 114.

*Louisiana*.—*Massieu's Succession*, 24 La. Ann. 237.

*Michigan*.—*O'Flynn v. Eagle*, 7 Mich. 306.

*Missouri*.—*Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845; *Barkley Cemetery Assoc. v. McCune*, 119 Mo. App. 349, 95 S. W. 295.

*New Jersey*.—*Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184.

*New York*.—*Brewster v. Manning*, 6 Hun 530.

*Oklahoma*.—*Nolan v. St. Louis & S. F. R. Co.*, 19 Okla. 51, 91 Pac. 1128.

*Texas*.—*Holder v. State*, 35 Tex. Crim. 19, 29 S. W. 793.

*Wisconsin*.—*Thomas v. Steele*, 22 Wis. 207; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243.

<sup>17</sup> See *supra*, § 230.

<sup>18</sup> *Bell v. Farwell*, 89 Ill. App. 638, affirmed 180 Ill. 414, 59 N. E. 955; *Dangerfield v. Thruston*, 8 Mart. N. S. (La.) 233; *Whitsell v. New Jersey & H. R. R. & Ferry Co.*, 68 App. Div. 82, 74 N. Y. S. 217; *Stewart v. Stewart*, 56 How. Pr. (N. Y.) 256; *Rosenthal v. Forman*, 115 N. Y. S. 282.

<sup>19</sup> *Osborn v. U. S. Bank*, 9 Wheat. 738, 6 U. S. (L. ed.) 204; *Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185; *Perry v. Lord*, 111 Mass. 504; *Andrews v. Harrington*, 19 Barb. (N. Y.) 343.

*Collateral Questions Will Not Be Considered*.—On motion for information as to authority of attorneys to commence action in name of a corporation of another state, the question whether it has ceased to exist under the laws of that state, or whether the person alleged to be its president and trustee, and to have given them authority, is such, or, being such, has power to authorize commencement of the action, cannot be considered. *Havana City R. Co. v. Ceballos*, 25 Misc. 660, 56 N. Y. S. 360.



course, sufficient,<sup>20</sup> and such authority may be found in a verified complaint,<sup>1</sup> or in correspondence between the parties,<sup>2</sup> or in the written request of the litigant's agent to act for his principal;<sup>3</sup> but in those cases the writing itself should be produced.<sup>4</sup> So, also,

<sup>20</sup> *Stream v. Lloyd*, 128 Ill. 493, 21 N. E. 533; *Olmstead v. Firth*, 60 Minn. 126, 61 N. W. 1017; *Stewart v. Stewart*, 56 How. Pr. (N. Y.) 256; *Grubb v. Serrill*, 1 Del. Co. Rep. (Pa.) 141; *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539.

Where a party wrote to an attorney telling him to "take hold of the case at once, and be sure to stave it off," it was held that the defendant was bound by the appearance entered by the attorney. *Clark v. Lilliebridge*, 45 Kan. 567, 26 Pac. 43.

But the fact that the plaintiff signed an appeal bond is not sufficient to overcome his positive statement under oath that he has not in any manner authorized the commencement or prosecution of the suit. *Bell v. Farwell*, 89 Ill. App. 638, affirmed 189 Ill. 414, 59 N. E. 955. See also *Gibson v. Hitchcock*, 35 La. Ann. 1201.

A mere clerical error in the writing is immaterial. *Stream v. Lloyd*, 128 Ill. 493, 21 N. E. 533.

<sup>1</sup> A complaint verified by the plaintiff is, in legal effect, a written request to an attorney to commence the action, and a written recognition of his authority so to do, sufficient to satisfy a statute which provides that any written request of the plaintiff or his agent, to the plaintiff's attorney, to commence the action, or any written recognition of his authority so to do, verified by the affidavit of the attorney, or any other competent witness, is sufficient presumptive evidence of such authority. *Graham v.*

*Attys. at L. Vol. I.—28.*

*Andrews*, 11 Misc. 649, 24 Civ. Pro. 263, 32 N. Y. S. 795.

<sup>2</sup> *Louisiana*.—*Hardesty's Succession*, Man. Unrep. Cas. 111.

*Minnesota*.—*Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347; *Henderson v. Eckern*, 115 Minn. 410, Ann. Cas. 1912D 989, 132 N. W. 715.

*New York*.—*Bush v. Miller*, 13 Barb. 481.

*North Carolina*.—See also *Day v. Adams*, 63 N. C. 254.

*Oregon*.—*Buhl Malleable Co. v. Cronan*, 59 Ore. 242, 117 Pac. 317.

*Letter from Third Person Asking the Attorney to Appear*.—One cannot prove his authority to appear as attorney for a party in suit before a justice, by producing a letter from a third person asking him to appear; nor will the fact that the third person is himself a lawyer be sufficient to give authority, if it does not distinctly appear that he is attorney for the party. *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544. See also *Day v. Adams*, 63 N. C. 254.

<sup>3</sup> *Grignon v. Schmitz*, 18 Wis. 620.

<sup>4</sup> *Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185; *State v. Tilghman*, 6 Iowa 496.

*Compare Lindheim v. Manhattan R. Co.*, 68 Hun 122, 22 N. Y. S. 685, wherein it was held that where the attorney testifies that he was employed by letter, it is not indispensable that he should produce the letter itself. And see to the same effect *State v. Tilghman*, 6 Iowa 496.

an attorney's authority may be shown by the fact that he was paid by the party whom he assumed to represent;<sup>5</sup> or that he entered his name on the judge's docket as attorney for a party, and that with the knowledge and consent of such party he ordered witnesses for him and signed the *præcipe* book in the clerk's office therefor;<sup>6</sup> or by affidavits, alleging his employment, filed and made part of the record in the action in which the judgment was rendered;<sup>7</sup> or by the affidavit of his client's agent;<sup>8</sup> or by certified copies of the proceedings of the directors of the corporation by which he was retained.<sup>9</sup> The facts that the attorney entered his appearance and prepared pleadings may also be taken into consideration, and an instruction that a retainer must be proved independently of them is calculated to mislead the jury.<sup>10</sup> An attorney is a competent witness to prove his own authority,<sup>11</sup> but his testimony is not conclusive, and when overcome it must be proven by other legal evidence.<sup>12</sup> All that is required to be shown in such cases, in the first instance, is that the attorney has acted in good faith, and under an authority appearing to be genuine, even though it be informal; it then devolves upon the party impeaching his authority to show by positive proof that it is invalid, and insufficient in substance.<sup>13</sup> Where the question of an attorney's authority arises in a jury trial, as, for instance, in an attack upon a judgment, or final order or decree, any conflict of evidence raises

<sup>5</sup> *Baker v. Baker*, 9 Cal. App. 737, 100 Pac. 802; *Neff v. Smyth*, 111 Ill. 100.

<sup>6</sup> *Higbee v. Spangler*, 127 Mo. App. 220, 104 S. W. 1143.

<sup>7</sup> *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, 54 N. E. 211.

<sup>8</sup> *Hughes v. Osborn*, 42 Ind. 450.

<sup>9</sup> *Miller v. Continental Assur. Co.* 233 Mo. 91, Ann. Cas. 1912C 102, 134 S. W. 1003.

<sup>10</sup> *Stillwell v. Badgett*, 22 Ark. 164.

<sup>11</sup> *Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185; *Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347; *Folly v. Smith*, 12 N. J. L. 140; *Caniff v. Myers*, 15 Johns. (N. Y.) 246; *Tul-*

*lock v. Cunningham*, 1 Cow. (N. Y.) 256; *Pixley v. Butts*, 2 Cow. (N. Y.) 421.

Where several attorneys are employed to represent the defendants in an action, evidence of one of the attorneys that one of the defendants did not employ him shows sufficiently that the attorneys had no authority to appear for him. *Patterson v. Yancey*, 97 Mo. App. 681.

<sup>12</sup> *Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185.

<sup>13</sup> *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567; *Low v. Settle*, 22 W. Va. 387.

a question for the determination of the jury;<sup>14</sup> but where the question presents itself during the progress of the cause in which it is alleged that he has unauthorizedly appeared the question is, of course, one for the court.<sup>15</sup> Where, during the pendency of proceedings, and after his appearance, an attorney procures from his client written authority to appear, it relates back, in effect, and recognizes all that the attorney has done in the proceeding.<sup>16</sup>

**§ 240. Requiring Proof of Authority.** — A *prima facie* case having been made out, the court will order the attorney to prove his authority to appear. The usual method is to require the filing of a warrant of attorney, but in some instances mere proof of authority, oral or by affidavit, will be a sufficient compliance with the order. Frequently the matter is regulated by statute, which, of course, must be complied with.<sup>17</sup> The order should state the

<sup>14</sup> *Howard v. Smith*, 33 Super. Ct. (N. Y.) 124; *Alspaugh v. Jones*, 64 N. C. 29; *Henderson v. Terry*, 62 Tex. 281; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

<sup>15</sup> *Colorado*.—*Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806.

*Iowa*.—*Krause v. Hampton*, 11 Ia. 457.

*Missouri*.—*Clark v. Holliday*, 9 Mo. 711.

*New York*.—*Carpenter v. Allen*, 45 Super. Ct. 323.

*Pennsylvania*.—*Newhart v. Wolfe*, 2 Penny. 295.

<sup>16</sup> *Olmstead v. Firth*, 60 Minn. 126, 61 N. W. 1017.

<sup>17</sup> *United States*.—*King of Spain v. Oliver*, 2 Wash. 429, 14 Fed. Cas. No. 7,814; *Standefer v. Dowlin*, Hempst. 209, 22 Fed. Cas. No. 13,284a.

*Alabama*.—*Daughdrill v. Daughdrill*, 108 Ala. 321, 19 So. 185; *Doe v. Abbott*, 152 Ala. 243, 44 So. 637, 126 Am. St. Rep. 30.

*Arkansas*.—*Tally v. Reynolds*, 1

Ark. 99, 31 Am. Dec. 737; *Cartwell v. Menifee*, 2 Ark. 356.

*California*.—*Garrison v. McGowan*, 48 Cal. 592; *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51.

*Colorado*.—*Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806; *Colorado Coal, etc., Co. v. Carpita*, 6 Colo. App. 248, 40 Pac. 248.

*Georgia*.—*Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7.

*Illinois*.—*Swift v. Lee*, 65 Ill. 336.

*Iowa*.—*State v. Beardsley*, 108 Iowa 396, 79 N. W. 138.

*Kentucky*.—*McAlexander v. Wright*, 3 T. B. Mon. 194, 16 Am. Dec. 93; *Belt v. Wilson*, 6 J. J. Marsh. 495, 22 Am. Dec. 88.

*Maine*.—*Prentiss v. Kelly*, 41 Me. 436.

*Michigan*.—*O'Flynn v. Eagle*, 7 Mich. 306; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481.

*Minnesota*.—*Smith v. Funk*, 114 Minn. 367, 131 N. W. 377. And see *Farrington v. Wright*, 1 Minn. 241.

time and place at which the authority must be produced, filed or proven.<sup>18</sup> A statute providing that an attorney need file his warrant only "if required" so to do, means required by the court; and hence a rule entered without leave of court, will be discharged as having been entered without proper authority.<sup>19</sup> Where an attorney instituted suit at the instance of the plaintiff's wife (plaintiff being at sea), and moved for a commission to foreign parts, without having filed his warrant of attorney, it was held that the commission might issue at once, and a rule to file the warrant be made returnable at the next term.<sup>20</sup> A warrant of attorney should be executed in accordance with the *lex fori*; <sup>1</sup> but an attorney having complied with a rule to file his warrant of authority by filing one sufficient in form and manner of execution, any alleged defects should be pointed out by exceptions, and it is error to summarily strike it from the files.<sup>2</sup> No writ of error will lie from

*Mississippi*.—McKiernan v. Patrick, 4 How. 333.

*Missouri*.—Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443; Valle v. Picton, 91 Mo. 207, 3 S. W. 860, *affirming* 16 Mo. App. 178; Robinson v. Robinson, 32 Mo. App. 90.

*New Hampshire*.—Manchester Bank v. Fellows, 28 N. H. 302; Stevens v. Fuller, 55 N. H. 443.

*New York*.—Hollins v. St. Louis & C. R. Co., 57 Hun 139, 25 Abb. N. Cas. 93, 11 N. Y. S. 27; New York City and County Com'rs v. Purdy, 36 Barb. 266; Wilcox v. Clement, 4 Denio 160; Silkman v. Boiger, 4 E. D. Smith 236.

*Pennsylvania*.—Fisler v. Reach, 202 Pa. St. 74, 51 Atl. 599.

*South Carolina*.—Allen v. Green, 1 Bailey L. 448; Hellman v. McWhennie, 3 Rich. L. 364.

*Tennessee*.—Jones v. Williamson, 5 Cold. 379; Ex p. Gillespie, 3 Yerg. 325.

<sup>18</sup> Turner v. Davis, 2 Denio (N. Y.) 187, 2 How. Pr. 86.

*Warrant of Attorney Defined*.—A warrant of attorney is an instrument

authorizing an attorney at law to appear in behalf of its maker. Treat v. Tolman, 113 Fed. 892, 51 C. C. A. 522, *affirming* 106 Fed. 679.

<sup>19</sup> Com. v. Serfass, 5 Pa. Co. Ct. 139, 3 Del. Co. Rep. 418.

<sup>20</sup> Boutlier v. Johnson, 2 Browne (Pa.) 17.

<sup>1</sup> Com. v. Peterson, 1 Pa. L. J. Rep. 482, 3 Pa. L. J. 154.

In Fisler v. Reach, 202 Pa. St. 74, 51 Atl. 599, it was held that a statutory requirement to the effect that every attorney, if called on to do so, shall "file his warrant of attorney in the office of the prothonotary, or clerk of the court in which such action shall be dependent," was not met by proof that the action was originally brought with the consent of the plaintiff, as the act required a specific form of proof to be filed in order that the right might be clearly and indisputably shown, and this requirement could not be dispensed with.

<sup>2</sup> Danville, H., etc., R. Co. v. Rhodes,

an order of the court refusing to permit an attorney to appear in a cause for want of authority.<sup>3</sup>

### § 241. Consequences of Unauthorized Appearance.—

Where an attorney appears in a cause without authority, the court will grant such relief as the circumstances may justify. In some jurisdictions the proper course is to stay the proceedings;<sup>4</sup> indeed, in those states, the rule to file a warrant of attorney works of itself a stay of proceedings.<sup>5</sup> But an order staying all proceedings until the attorney proves his authority is bad; it should merely stay all proceedings by the unauthorized attorney.<sup>6</sup> So, also, proceedings instituted by such attorney may be dismissed.<sup>7</sup>

180 Pa. St. 157, 36 Atl. 648, 40 W. N. C. 5.

It is not essential that an attorney's warrant of authority to conduct the proceedings for his client shall be under seal. Any written authority empowering him to act is sufficient. *Grubb v. Serrill*, 1 Del. Co. Rep. (Pa.) 141.

*Clerical Error.*—The authority being to prosecute an action, it is immaterial that by a clerical error the name of a wrong county is inserted in the written recognition, as such suit can only be commenced where the land lies. *Strean v. Lloyd*, 128 Ill. 493, 21 N. E. 533.

<sup>3</sup> *Ex p. Gillespie*, 3 Yerg. (Tenn.) 325.

<sup>4</sup> *Meyer v. Littell*, 2 Pa. St. 177; *Danville, H., etc., R. Co. v. Rhodes*, 180 Pa. St. 157, 36 Atl. 648. See also *Hubbart v. Phillips*, 13 M. & W. (Eng.) 702; *Hudson River W. S. R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y.) 191; *Howard v. Howard*, 11 How. Pr. (N. Y.) 80; *Rosenthal v. Forman*, 115 N. Y. S. 282.

*Compare* *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561, holding that where a party, for

whom a regularly licensed solicitor assumes to act, denies his authority, and applies to the court for relief, before the adverse party has acquired any rights or suffered any prejudice in consequence of the acts of such solicitor, the court may correct the proceeding; but if the adverse party has acquired rights, or been subjected to costs, by proceedings in the name of a party who denies the authority of the solicitor by whom the proceedings have been conducted, the proceedings will be permitted to stand.

Where process is served upon a party, and there is an appearance by an unauthorized attorney, the party will not be relieved if the attorney is responsible. *Allen v. Stone*, 10 Barb. (N. Y.) 547.

<sup>5</sup> *Reese v. Church of the Messiah*, 1 W. N. C. (Pa.) 416; *Dunn v. Stone Co.*, 11 W. N. C. (Pa.) 95.

<sup>6</sup> *Farrington v. Wright*, 1 Minn. 241.

<sup>7</sup> *California.*—*Turner v. Caruthers*, 17 Cal. 431.

*Illinois.*—*Anonymous*, 11 Ill. 488; *Frye v. Calhoun County*, 14 Ill. 132.

*Iowa.*—*Savary v. Savary*, 3 Iowa 271.

The inexcusable entry of unauthorized appearances is, fortunately, decidedly infrequent. It undoubtedly tends to bring the administration of justice into disrepute, and has been deemed, in one state at least, a contempt of court;<sup>8</sup> and a practice of that character would, in most states, be considered cause for disbarment.<sup>9</sup>

**§ 242. Waiver of Objection.** — The right to object to an appearance on the ground that it is unauthorized may be waived.<sup>10</sup> Such a waiver may be predicated on the pleading of the general issue,<sup>11</sup> or by the service of papers,<sup>12</sup> without raising an objection; or by failing to object in due time.<sup>13</sup> And where, on the revival of an action after the death of the plaintiff, the subsequent proceedings were taken in the name of the executor by the same attorney who had acted for the plaintiff, and acquiesced in by the executor, the defendant cannot object to the attorney's authority.<sup>14</sup> So, in the absence of any notice or order of substitution, where the record shows that an attorney has been acting for a party all through the case except in the filing of the original answer, and has been rec-

*Kentucky.*—*Belt v. Wilson*, 6 J. J. Marsh. 495, 22 Am. Dec. 88.

*Missouri.*—*Keith v. Wilson*, 6 Mo. 435, 35 Am. Dec. 443.

*New York.*—*Lindheim v. Manhattan R. Co.*, 68 Hun 122, 22 N. Y. S. 685.

*Unauthorized Filing of Demurrer.*—Where an attorney, without authority, files a demurrer, or other such pleading, the defendant will not thereby lose his right to withdraw this demurrer, and to file another at the next term of court in its stead. *Winterstien v. Walker*, 10 Iowa 198.

<sup>8</sup> "Any attorney appearing for a person without being employed, unless by leave of the court, is guilty of a contempt of court, and must be fined in a sum not less than five hundred dollars." Ga. Code (1911), sec. 4960.

<sup>9</sup> See *infra*, § 816.

<sup>10</sup> *Doe v. Abbott*, 152 Ala. 243, 44

So. 637, 126 Am. St. Rep. 30; *Bishop v. Bishop*, 30 Abb. N. Cas. 296, 24 N. Y. S. 888; *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605.

<sup>11</sup> *Lucas v. Georgia Bank*, 2 Stew. (Ala.) 149; *Campbell v. Galbreath*, 5 Watts (Pa.) 423. And see *Herrell v. Prince William County*, 113 Va. 594, 75 S. E. 87.

Compare *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544, wherein it was said, in construing the Michigan statute, that it would be rash to say that the putting in a plea by one who turns out to have no authority would be sufficient to take away the force of the provision.

<sup>12</sup> *Smith v. Smith*, 145 Cal. 615, 79 Pac. 275; *Fanning v. Minnesota R. Co.*, 37 Iowa 379.

<sup>13</sup> See *supra*, § 238.

<sup>14</sup> *Fisher v. Musick*, 72 S. W. 787, 24 Ky. L. Rep. 1913.

ognized as such by the court and the opposing counsel, it cannot be said that he was not the attorney of record in the action.<sup>15</sup> So, also, where the party for whom the appearance has been entered ratifies the act of the attorney who presumed, unauthorizedly, to appear for him, he thereby waives his right to object afterwards to the acts of such attorney; having ratified them, he must abide the consequences.<sup>16</sup> The general subject of ratification has been considered elsewhere.<sup>17</sup>

*Effect of Unauthorized Appearance after Judgment.*

§ 243. Generally. — The general rule is that a party against whom a judgment has been entered in consequence of the unauthorized appearance of an attorney, will be afforded relief either by motion in the original proceeding,<sup>18</sup> or by a bill in equity either

<sup>15</sup> *Hoppin v. First Nat. Bank*, 25 Nev. 84, 56 Pac. 1121.

<sup>16</sup> *United States*.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 U. S. (L. ed.) 52.

*Arkansas*.—*Hines v. Stephens*, 90 Ark. 518, 119 S. W. 664.

*California*.—*Seale v. McLaughlin*, 28 Cal. 668; *Smith v. Smith*, 145 Cal. 615, 79 Pac. 275.

*District of Columbia*.—*Hutchins v. Munn*, 28 App. Cas. 271, *affirmed* 209 U. S. 246, 28 S. Ct. 504, 52 U. S. (L. ed.) 776.

*Illinois*.—*Strong v. Smith*, 98 Ill. App. 522.

*Iowa*.—*Ryan v. Doyle*, 31 Ia. 53.

*Kansas*.—*Dresser v. Wood*, 15 Kan. 344.

*Louisiana*.—*Mason v. Stewart*, 6 La. Ann. 736; *Simonin v. Czarnowski*, 47 La. Ann. 1334, 17 So. 847.

*Maine*.—*Strout v. Durham*, 23 Me. 483.

*Missouri*.—*Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

*New York*.—*Ward v. Roy*, 60 N. Y.

96; *Bogardus v. Livingston*, 7 Abb. Pr. 428.

*North Dakota*.—*State v. Harris*, 14 N. D. 501, 105 N. W. 621.

*Pennsylvania*.—*Miller v. Preston*, 154 Pa. St. 63, 25 Atl. 1041.

*Virginia*.—*Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605.

<sup>17</sup> See *supra*, §§ 211–214.

<sup>18</sup> *United States*.—*Bonnifield v. Thorp*, 71 Fed. 928.

*Colorado*.—*Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.

*Illinois*.—*Lyon v. Boilvin*, 2 Gilman 629.

*Indiana*.—*Bush v. Bush*, 46 Ind. 70; *Coon v. Welborn*, 83 Ind. 230; *Hollinger v. Reeme*, 138 Ind. 372, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L.R.A. 46.

*Missouri*.—*Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911.

*New Jersey*.—*Jones v. McKelway*, 17 N. J. L. 345.

*New York*.—*Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237; *Campbell v. Bristol*, 19 Wend. 101; *Vilas v.*

for the annulment of the judgment, or to enjoin its enforcement,<sup>19</sup> providing, of course, that the unauthorized action on the part of the attorney is clearly established.<sup>20</sup> The question of an attorney's authority to enter an appearance is open to proof on behalf

Plattsburgh, etc., R. Co., 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844; *Post v. Charlesworth*, 66 Hun 256, 21 N. Y. S. 168; *Gilman v. Tucker*, 57 Super. Ct. 324, 7 N. Y. S. 682; *New York v. Smith*, 61 Super. Ct. 374, 48 N. Y. St. Rep. 586.

*Ohio*.—*Critchfield v. Porter*, 3 Ohio 519; *Abernathy v. Latimore*, 19 Ohio 286.

*Pennsylvania*.—*Cyphert v. McClune*, 22 Pa. St. 195.

*Vermont*.—*Spaulding v. Swift*, 18 Vt. 214; *Abbott v. Dutton*, 44 Vt. 546.

<sup>19</sup> *United States*.—*Shelton v. Tiffin*, 6 How. 163, 12 U. S. (L. ed.) 387; *U. S. v. Throckmorton*, 98 U. S. 61, 25 U. S. (L. ed.) 93; *Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 U. S. (L. ed.) 52; *Mills v. Scott*, 43 Fed. 452.

*Indiana*.—*Pierson v. Holman*, 5 Blackf. 482; *Wiley v. Pratt*, 23 Ind. 628; *Hollinger v. Reeme*, 138 Ind. 372, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L.R.A. 46.

*Iowa*.—*De Louis v. Meek*, 2 G. Greene 55, 50 Am. Dec. 491; *Powell v. Spaulding*, 3 G. Greene 443; *Harshey v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Newcomb v. Dewey*, 27 Iowa 381; *Parsons v. Nutting*, 45 Iowa 404.

*Kentucky*.—*Handley v. Stator*, Litt. Sel. Cas. 186.

*Louisiana*.—*Ridge v. Alter*, 14 La. Ann. 880.

*New Jersey*.—*Gifford v. Thorn*, 9 N. J. Eq. 702.

*New York*.—*American Ina. Co. v. Oakley*, 9 Paige 496; *Blodget v. Conklin*, 9 How. Pr. 442; *Brown v. Nichols*, 42 N. Y. 26; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844; *Gilman v. Prentice*, 11 Civ. Proc. 310, 3 N. Y. St. Rep. 544.

*Ohio*.—*Pillsbury v. Dugan*, 9 Ohio 118, 34 Am. Dec. 427.

*Oregon*.—*Handley v. Jackson*, 31 Ore. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

*Tennessee*.—*Boro v. Harris*, 13 Lea 37; *Jones v. Williamson*, 5 Coldw. 375; *Coles v. Anderson*, 8 Humph. 490; *Courtney v. Dyer*, 1 Ky. L. Rep. 134 Abstract.

In *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 440, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844, it was said that relief from a judgment rendered against a party upon the unauthorized appearance of an attorney in his name, in the absence of special circumstances necessitating a resort to a court of equity, may be sought only by motion in the action in which the unauthorized appearance was entered.

<sup>20</sup> *Jones v. Williamson*, 5 Coldw. (Tenn.) 371.

In *Harshey v. Blackmarr*, 20 Ia. 161, 185, 89 Am. Dec. 520, the court said: "In all cases, the right should be clear, the injury palpable, and the evidence convincing. The reason for this is manifest in the consideration that after the lapse of time it is very easy for a party to say, and under our law to swear, that an attorney who is perhaps dead had no authority to



of the judgment debtor wherever an attempt is made to enforce the judgment.<sup>1</sup> Thus it has been held that a judgment in one state against two defendants, one of whom is an inhabitant of another state, and was not served with process, nor his property attached, and who did not authorize any appearance in his behalf, may be reversed, as to him, by writ of error, although the record states that, at the term at which the action was entered, the defendants came by their attorney.<sup>2</sup> So it has been held that in a petition for the review of an action in which the defendant was absent from the state and had no notice of the suit, but in which an attorney at law appeared and continued to act until judgment was rendered, it is competent for the petitioner to prove by parol that the attorney's appearance was without his knowledge or authority, and if that fact is established the appearance can in no way legally affect him.<sup>3</sup> *Audita querela* will not lie.<sup>4</sup> In all cases the rights of innocent third persons will be protected.<sup>5</sup>

Under the old *English* rule, however, the validity of the judgment is recognized, and relief will only be granted where the attorney, upon whose unauthorized appearance the judgment rests, is insolvent; if he is a responsible person the party will be obliged

represent him, and correspondingly difficult for the other party to show the contrary. The true inference from this is, not to hold the unauthorized judgment valid, but to require the party assailing it to make a clear case, and to hold that a mixed case will not do."

<sup>1</sup> *Korman v. Grand Lodge, etc.*, 44 Misc. 564, 29 N. Y. S. 120.

<sup>2</sup> *Bodurtha v. Goodrich*, 3 Gray (Mass.) 508.

<sup>3</sup> *McNamara v. Carr*, 84 Me. 299, 24 Atl. 856.

Compare *Floyd County Agricultural, etc., Assoc. v. Thompkins*, 23 Ind. 348, 352, wherein it was held that the party for whom an attorney has appeared without authority cannot obtain relief in proceedings for review.

<sup>4</sup> In *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394, the court said: "If the party has any remedy for the unauthorized appearance of an attorney, other than his remedy against the attorney, it is by application directly to the court which rendered the judgment against him on the unauthorized appearance of the attorney, or by writ of error, and not by *audita querela*. *Spaulding v. Swift*, 18 Vt. 214."

<sup>5</sup> *Harshey v. Blackmarr*, 20 Ia. 161, 89 Am. Dec. 520; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496; *Hatcher v. Faison*, 142 N. C. 364, 55 S. E. 284; *Thomas v. Jarden*, 57 Pa. St. 331.

In *Williams v. Johnson*, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513, 21 L.R.A. 848, it was held that par-

to look to him;<sup>6</sup> this rule is followed in some jurisdictions in this country.<sup>7</sup>

**§ 244. Domestic Judgment.** — As stated in the preceding section, the prevailing rule in this country is that a judgment procured by virtue of an unauthorized appearance is absolutely void; and upon proper objection,<sup>8</sup> and sufficient proof,<sup>9</sup> the party for whom the unauthorized appearance was entered will be entitled to relief,<sup>10</sup> providing, of course, that there has been no ratification of

ties about to acquire rights under the judgments of courts are not bound to inquire into the authority of the attorneys who profess to represent the parties; and where such rights have been acquired by one who had no notice of the lack of authority on the part of an attorney who professed to represent the owners in a proceeding for the sale of land, no evidence tending to disprove the existence of such authority ought to be admitted to overthrow the rights so acquired.

And see *Kenyon v. Shreck*, 52 Ill. 382, wherein it was said that the court would look with great disfavor on any application to vacate a judgment on the grounds of an unauthorized appearance, where innocent third parties had acquired rights under the judgment or decree.

<sup>6</sup> *Anonymous*, 1 Salk. (Eng.) 88, wherein an attorney appeared without authority, and judgment was entered against his client, and the question was whether the court could set aside the judgment. And it was held that "if the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible, or suspicious, we

will set aside the judgment; for otherwise the defendant has no remedy, and anyone may be undone by that means." And see also *Robson v. Eaton*, 1 T. R. (Eng.) 62; *Stanhope v. Firmin*, 3 Bing. N. Cas. 303, 32 E. C. L. 128; *Hambidge v. De La Crouee*, 3 C. B. 742, 54 E. C. L. 742; *Williams v. Smith*, 1 Dowl. (Eng.) 632; *Doe v. Eyton*, 3 B. & Ad. 785, 23 E. C. L. 185.

But this rule has been criticised and partially, at least, overruled, in a later case, where this subject was carefully considered and the prior cases called to the attention of the court. See *Bayley v. Buckland*, 1 Exch. (Eng.), wherein Rolfe, B., alluding to *Anonymous*, 1 Salk. (Eng.) 88, says: "The nonresponsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame and may notwithstanding be ruined."

<sup>7</sup> See the following section.

<sup>8</sup> See *infra*, §§ 234-242. And see also the preceding section.

<sup>9</sup> *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61; *Patterson v. Yancey*, 97 Mo. App. 681, 694, 695, 71 S. W. 845. And see *infra*, § 245.

<sup>10</sup> *United States*.—*Hill v. Mendenhall*, 21 Wall. 453, 22 U. S. (L. ed.) 616; *Shelton v. Tiffin*, 6 How. 163, 12

U. S. (L. ed.) 387 (the leading case supporting this view); *Mills v. Scott*, 43 Fed. 452; *Hatch v. Ferguson*, 57 Fed. 966; *Maury v. Fitzwater*, 88 Fed. 768. See also *Bonnifield v. Thorp*, 71 Fed. 924.

*Colorado*.—*Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *DuBois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.

*Dakota*.—*Williams v. Neth*, 4 Dak. 360, 31 N. W. 630.

*Georgia*.—*Dobbins v. Dupree*, 39 Ga. 394.

*Illinois*.—*Truett v. Wainwright*, 4 Gilman 420; *Leslie v. Fischer*, 62 Ill. 118; *Bonnell v. Holt*, 80 Ill. 71; *Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566. *Contra Rust v. Frothingham*, Breese, 331.

*Indiana*.—*State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209.

*Iowa*.—*Powell v. Spaulding*, 3 G. Greene 443; *Potter v. Parsons*, 14 Iowa 286; *Harshey v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa 329; *Newcomb v. Dewey*, 27 Iowa 381; *Russell v. Pottawottamie County*, 29 Iowa 256; *Macomber v. Peck*, 39 Iowa 351.

*Kansas*.—*Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86; *Newton First Nat. Bank v. Wm. B. Grimes Dry-Goods Co.*, 45 Kan. 510, 26 Pac. 56; *Pennsylvania Trust Co. v. Cowles*, 3 Kan. App. 660, 45 Pac. 605.

*Louisiana*.—*Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424.

*Maine*.—*McNamara v. Carr*, 84 Me. 209, 24 Atl. 856.

*Maryland*.—*Taylor v. Welslager*, 90 Md. 414, 45 Atl. 478. See also *Munnikuyson v. Dorsett*, 2 Har. & G. 374

(holding that such appearance does not *per se* invalidate the judgment).

*Missouri*.—*Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911.

*Nebraska*.—*Kepley v. Irwin*, 14 Neb. 300, 15 N. W. 719; *Winters v. Means*, 25 Neb. 242, 41 N. W. 157, 13 Am. St. Rep. 489; *Kirschbaum v. Scott*, 35 Neb. 199, 52 N. W. 1112; *Kaufmann v. Drexel*, 56 Neb. 229, 76 N. W. 559; *Chicago, B., etc., R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97.

*New Jersey*.—*Jones v. McKelway*, 17 N. J. L. 345; *Ward v. Price*, 25 N. J. L. 225.

*Ohio*.—*Critchfield v. Porter*, 3 Ohio 510.

*Pennsylvania*.—*Lawrence v. Rutherford*, 1 Pearson 555; *Coxe v. Nicholls*, 2 Yeates 546; *Bryn Mawr Nat. Bank v. James*, 152 Pa. St. 364, 25 Atl. 823. See also *Cyphert v. McClune*, 22 Pa. St. 195 (holding that judgment is good on collateral attack).

*Texas*.—*Chapman v. Austin*, 44 Tex. 133.

*Virginia*.—*Raub v. Otterback*, 89 Va. 645, 16 S. E. 933.

*Washington*.—*Turner v. Turner*, 33 Wash. 118, 74 Pac. 55.

*West Virginia*.—*Neill v. McClung*, 76 S. E. 878.

*Canada*.—*Massey v. Rapelje*, 5 U. C. C. P. 134; *Roissier v. Westbrook*, 24 U. C. C. P. 91; *Wright v. Hull*, 2 Ont. Pr. 26.

*Attorney Exceeding Authority*.—The doctrine that a domestic judgment is void when the appearance is unauthorized, and there has been no service of process, does not obtain in cases where an attorney, regularly employed, has exceeded his authority.

*Alabama*.—*Collier v. Falk*, 66 Ala. 229.

the unauthorized act.<sup>11</sup> This rule, however, is by no means universal. In several states it is held that an appearance by an attorney, whether for the plaintiff or the defendant, if there is no collusion, may be recognized by the adverse party as authentic and valid; that when an attorney appears for a party, the court, in case of a domestic judgment, looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against such attorney if he is financially responsible;<sup>12</sup> and this is especially true where the defendant has been served with

*Iowa*.—Harshey v. Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

*Kansas*.—McNeal v. Gossard, 68 Kan. 113, 74 Pac. 628.

*New Jersey*.—Hendrickson v. Hendrickson, 15 N. J. L. 102.

*New York*.—Kramer v. Gerlach, 28 Misc. 525, 59 N. Y. S. 855.

<sup>11</sup> See *supra*, §§ 211-214.

<sup>12</sup> *California*.—Suydam v. Pitcher, 4 Cal. 280; Holmes v. Rogers, 13 Cal. 191; Carpenter v. Oakland, 30 Cal. 439. Compare Garrison v. McGowan, 48 Cal. 592; Merced Co. v. Hicks, 67 Cal. 108, 7 Pac. 179.

*Georgia*.—Hirsch v. Fleming, 77 Ga. 594, 3 S. E. 9.

*Kentucky*.—Holbert v. Montgomery, 5 Dana 16; Derr v. Wilson, 84 Ky. 14.

*Massachusetts*.—Finneran v. Leonard, 7 Allen 54, 83 Am. Dec. 665; Smith v. Bowditch, 7 Pick. 137.

*Michigan*.—Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

*Mississippi*.—Schirling v. Scites, 41 Miss. 644.

*Nevada*.—Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

*New Hampshire*.—Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth v. Balch, 40 N. H. 363; Everett v. Warner Bank, 58 N. H. 340.

*New York*.—Allen v. Stone, 10 Barb. 547; Armstrong v. Craig, 18 Barb. 387; Donohue v. Hungerford, 1 App. Div. 528, 37 N. Y. S. 628; Yates v. Horanson, 7 Robt. 12 (circumstances tending to establish collusion—judgment set aside); Hoffmire v. Hoffmire, 3 Edw. 173; Blodget v. Conklin, 9 How. Pr. 442; Gilman v. Tucker, 18 Civ. Pro. 50, 7 N. Y. S. 682; Powers v. Trenor, 3 Hun 3; Ferguson v. Crawford, 7 Hun 25; Palen v. Starr, 7 Hun 422; Watrous v. Kearney, 11 Hun 584; Gall v. Gall, 45 Hun 591, 10 N. Y. St. Rep. 331; Jackson v. Stewart, 6 Johns. 34; Denton v. Noyes, 6 Johns. 296, 5 Am. Dec. 237 (leading case on the subject); Grazebrook v. McCreddie, 9 Wend. 437; Adams v. Gilbert, 9 Wend. 499; Campbell v. Bristol, 19 Wend. 101; Reed v. Pratt, 2 Hill 64; Hamilton v. Wright, 37 N. Y. 502; Brown v. Nichols, 42 N. Y. 26; Washburn v. Coke, 144 N. Y. 287, 39 N. E. 388.

*North Carolina*.—Rogers v. McKenzie, 81 N. C. 164; England v. Garner, 90 N. C. 201; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513, 21 L.R.A. 848.

*Vermont*.—Coit v. Sheldon, 1 Tyler 300; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Spaulding v. Swift,

process.<sup>18</sup> The principle upon which a judgment founded upon an unauthorized appearance is held to be valid, is the necessity of accrediting judicial acts and records. Whenever the record of a case shows that there had been an appearance by attorney, the necessary judicial implication must be that the court has decided that the person entering the appearance was authorized to do so.<sup>14</sup> But even in those states relief will usually be granted where the adverse party has not acquired any rights or suffered any prejudice in consequence of the unauthorized acts,<sup>15</sup> or where it appears that the attorney is irresponsible,<sup>16</sup> or dead,<sup>17</sup> or where the judgment is one against a nonresident who has not been served with process.<sup>18</sup> So, also, the defendant will not be confined to his remedy against the attorney where the plaintiff or his attorney is a party to the wrong,<sup>19</sup> or where the defendant is in custody by reason of the unauthorized act of the attorney.<sup>20</sup>

### § 245. Foreign Judgment. — As to foreign judgments, the

18 Vt. 214; *Abbott v. Dutton*, 44 Vt. 546, 8 Am. Rep. 394.

<sup>13</sup> *Fitzgerald v. Fernandez*, 71 Cal. 505, 12 Pac. 562; *Woodward v. Willard*, 33 Ia. 542 (case of a foreign judgment); *Governor v. Lassiter*, 83 N. C. 43; *Hatcher v. Faison*, 142 N. C. 364, 55 S. E. 284.

<sup>14</sup> *Allen v. Stone*, 10 Barb. (N. Y.) 547; *Ellsworth v. Campbell*, 31 Barb. (N. Y.) 134; *Williams v. Van Valkenburg*, 16 How. Pr. (N. Y.) 147; *Denton v. Noyes*, 6 Johns. (N. Y.) 297, 5 Am. Dec. 237; *Meacham v. Dudley*, 6 Wend. (N. Y.) 514; *Hamilton v. Wright*, 37 N. Y. 502; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 453, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844. And see the cases cited in the preceding section at note 20.

*Compare* *Bean v. Mather*, 1 Daly (N. Y.) 440 (*criticising* *Denton v. Noyes*, 6 Johns. (N. Y.) 297, 5 Am. Dec. 237, and holding that the ap-

pearance of an attorney without authority is a nullity).

<sup>15</sup> *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496.

<sup>16</sup> *Blodget v. Conklin*, 9 How. Pr. (N. Y.) 442.

<sup>17</sup> *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 441, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844; *Herbert v. Lawrence*, 21 Civ. Pro. 336, 18 N. Y. S. 95.

<sup>18</sup> *Nordlinger v. De Mier*, 54 Hun 276, 7 N. Y. S. 463; *Matter of Stephani*, 75 Hun 188, 26 N. Y. S. 1039; *Myers v. Prefontaine*, 40 App. Div. 603, 58 N. Y. S. 70; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 456, 25 N. E. 941, 20 Am. St. Rep. 771, 9 L.R.A. 844.

<sup>19</sup> *Hambidge v. De La Crouee*, 3 C. B. 742, 54 E. C. L. 742; *Sterne v. Bentley*, 3 How. Pr. (N. Y.) 331.

<sup>20</sup> *Hambidge v. De La Crouee*, 3 C. B. 742, 54 E. C. L. 742.

general rule is that the defendant may successfully defend an action thereon by showing that the attorney who entered his appearance in the action had no authority to do so;<sup>1</sup> such a defense must, of course, be established as clearly as in the case of a domestic judgment.<sup>2</sup> In proving a foreign judgment, however, it is not

<sup>1</sup> *United States*.—*Shelton v. Tiffin*, 6 How. 164, 12 U. S. (L. ed.) 387; *D'Arcy v. Ketchum*, 11 How. 165, 13 U. S. (L. ed.) 648; *Graham v. Spencer*, 14 Fed. 603. See *contra* *Field v. Gibbs*, Pet. (C. C.) 155, 9 Fed. Cas. No. 4,766.

*Alabama*.—*Kingsbury v. Ynicestra*, 59 Ala. 320.

*Arkansas*.—*Eaton v. Pennywit*, 25 Ark. 144.

*Connecticut*.—*Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151.

*Illinois*.—*Welch v. Sykes*, 3 Gilman 197, 44 Am. Dec. 689; *Whittaker v. Murray*, 15 Ill. 293; *Thompson v. Emert*, 15 Ill. 415; *Lawrence v. Jarvis*, 32 Ill. 305.

*Indiana*.—*Sherrard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508; *Boylan v. Whitney*, 3 Ind. 140.

*Iowa*.—*Hindman v. Mackall*, 3 G. Greene 170; *Baltzell v. Nosler*, 1 Iowa 588, 63 Am. Dec. 466; *Harshey v. Blackmarr*, 20 Iowa 172, 89 Am. Dec. 520.

*Louisiana*.—*Miller v. Gaskins*, 3 Rob. 94; *Walworth v. Henderson*, 9 La. Ann. 339.

*Massachusetts*.—*Bodurtha v. Goodrich*, 3 Gray 508; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356; *Gleason v. Dodd*, 4 Mete. 333; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149; *Chicago Title, etc., Co. v. Smith*, 185 Mass. 366, 70 N. E. 426.

*Missouri*.—*Eager v. Stover*, 59 Mo. 87; *Napton v. Leaton*, 71 Mo. 358;

*Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911. See *contra* *Warren v. Lusk*, 16 Mo. 102; *Baker v. Stonebraker*, 34 Mo. 172.

*New Jersey*.—*Ward v. Price*, 25 N. J. L. 230.

*New York*.—*Howard v. Smith*, 35 Super. Ct. 131; *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272. Compare *Midletown Bank v. Huntington*, 13 Abb. Pr. 403; *Reed v. Pratt*, 2 Hill 64; *Ward v. Barber*, 1 E. D. Smith 423.

*Ohio*.—*Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340.

*Texas*.—*Norwood v. Cobb*, 24 Tex. 551.

*Virginia*.—*Wilson v. Mt. Pleasant Bank*, 6 Leigh 570.

<sup>2</sup> See *supra*, § 239.

A record of the supreme court of British Honduras, showing that the defendant corporation instituted a suit therein against plaintiff, and that such defendant was represented in the action by its solicitor, who continued to so represent it for a considerable time thereafter, is *prima facie* evidence that the action was instituted by the defendant's authority, and is not rebutted by testimony of defendant's vice-president that the note on which plaintiff was sued had been turned over to an agent for collection, who took it to Honduras, and died there; that he had searched for the note, and could not find it; and that he never heard of any suit being

necessary, in the first instance, to show the actual retainer of the attorney who appeared for the defendant.<sup>3</sup> Under the common-law system of pleading a defense to the enforcement of a judgment on the ground of an unauthorized appearance must be set up by a special plea; and the equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is to be used.<sup>4</sup> The defendant should also show a defense on the merits.<sup>5</sup> Speaking of the foregoing rule, and comparing it with the cases which support the view that a domestic judgment is valid, and that the defendant therein must look to the attorney,<sup>6</sup> one court has said: "It may be doubtful whether the . . . distinction between foreign and domestic judgments is fully settled; and if so whether it rests on sound principles. Is not the gravamen the same in the one case as in the other, and does it not consist in the authorized act of the attorney? We deem the rule properly settled as to foreign judgments. Why should it not equally apply to an action on a domestic judgment? The only reason that occurs to us is, that in the case of a foreign judgment it is impossible, or at least unreasonable, to require the defendant to go to the courts of the state which rendered it, and attack it directly by a bill or motion; hence, he is permitted to plead the want of authority in the attorney, defensively and collaterally. Whereas in the case of a domestic judgment it may be deemed better to force the party to assail it directly (thus giving the court an equitable control over the proceedings), by prohibiting him from resorting to the plea of a want of authority in the attorney, collaterally, as a defense to a *scire facias*, or direct action on the judgment. If the distinction is maintainable, it must be on some such ground." <sup>7</sup>

instituted on it. *Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

<sup>3</sup> *Davis v. Cohn*, 96 Mo. App. 587, 70 S. W. 727.

<sup>4</sup> *Hill v. Mendenhall*, 21 Wall. 453, 22 U. S. (L. ed.) 616.

<sup>5</sup> *Walworth v. Henderson*, 9 La. Ann. 339; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

<sup>6</sup> See the preceding section, notes 6, 7.

<sup>7</sup> *Harshey v. Blackmarr*, 20 Ia. 161, 89 Am. Dec. 520.

## CHAPTER XIII.

### AUTHORITY IN CONDUCTING LITIGATION.

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*In General.*

§ 246. **Scope of Authority.** — The general scope of an attorney's authority has been considered heretofore,<sup>1</sup> and consideration has also been given to his authority to appear for litigants,<sup>2</sup> to incur necessary expense,<sup>3</sup> and to accept service of process and other papers.<sup>4</sup> In matters pertaining to the conduct of litigation, however, the authority of an attorney is more extensive. He is more than an agent; he is also an officer of the court, and within his sphere, and in the line of his special powers, he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers entirely different from and superior to those of an ordinary agent.<sup>5</sup> Whatever is done by an attorney within the apparent scope of his authority in the progress of the cause, is regarded as having been

<sup>1</sup> See *supra*, §§ 199-214.

<sup>2</sup> See *supra*, §§ 229-245.

<sup>3</sup> See *infra*, § 252.

<sup>4</sup> See *infra*, §§ 253-257.

<sup>5</sup> *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134.

*A layman acting as an attorney*  
Attys. at L. Vol. I.—29.

cannot consent to any action binding his principal unless he is specifically and formally empowered for the very purpose, and his authority is produced. *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454.

done by, and binding on, the party himself,<sup>6</sup> even though there was no specific authority therefor,<sup>7</sup> or though the attorney abuse his trust, and be answerable to his client in damages;<sup>8</sup> the fidelity of the attorney in the discharge of his trust being a question between him and the party for whom he undertakes to act.<sup>9</sup> An attorney's authority is not limited to the mere prosecution of a suit; it extends to everything necessary to the protection and promotion of the interests committed to his care, so far as they are to be affected by the proceedings in the court where he represents his client.<sup>10</sup> He may do all things incidental to the prosecution of the suit, and which affect the remedy only and not the cause

<sup>6</sup> *United States*.—*Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147.

*California*.—*Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940.

*District of Columbia*.—*Brown v. Brown*, 7 D. C. 221.

*Kansas*.—*Cronkhite v. Evans-Snyder-Buel Co.*, 6 Kan. App. 173. 51 Pac. 295.

*Kentucky*.—*Hill v. Penn Mut. L. Ins. Co.*, 120 Ky. 190, 85 S. W. 759, 27 Ky. L. Rep. 567.

*Maine*.—*White v. Johnson*, 67 Me. 287.

*Maryland*.—*Bethel Church v. Carmack*, 2 Md. Ch. 143.

*Missouri*.—*Higbee v. Spangler*, 127 Mo. App. 220, 104 S. W. 1143.

*New York*.—*Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138.

*South Dakota*.—*State v. Frazier*, 26 S. D. 383, 128 N. W. 322.

*Wisconsin*.—*Lee v. Buckheit*, 46 Wis. 246, 49 N. W. 977.

<sup>7</sup> *Lawson v. Bettison*, 12 Ark. 401; *Wood v. Wood*, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L.R.A. 157; *Kent v. Ricards*, 3 Md. Ch. 392; *State v. Lewis*, 9 Mo. App. 321; *Palen v. Starr*, 7 Hun (N. Y.) 422;

*Clinton v. New York Cent. & H. R. Co.*, 147 App. Div. 468, 131 N. Y. S. 881; *Beck v. Bellamy*, 93 N. C. 129.

<sup>8</sup> *White v. Johnson*, 67 Me. 287; *Chambers v. Hodges*, 23 Tex. 104.

The fact that an attorney, authorized to enter appearance, waive service, and confess judgment, only enters the appearance and waives service, without confessing judgment, and allows a jury to hear the evidence and return a verdict, is not such a departure from the authority conferred by the power as will render all the acts done under it erroneous. *Stewart v. Hibernian Banking Ass'n*, 78 Ill. 596.

<sup>9</sup> *Bethel Church v. Carmack*, 2 Md. Ch. 143.

<sup>10</sup> *Paxton v. Cobb*, 2 La. 137; *Livesley v. Pier*, 11 Wash. 268, 39 Pac.

The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. *Matthews v. Munster*, 20 Q. B. D. (Eng.) 141, 57 L. J. Q. B. 49, 57 L. T. N. S. 922, 36 W. R. 178, 52 J. P. 260.

of action.<sup>11</sup> The omissions, as well as commissions, of an attorney, are to be regarded as the acts of the party whom he represents, and his neglect is equivalent to the neglect of the party himself.<sup>12</sup> The secret intentions of a client can affect neither the attorney nor those with whom he transacts business for his client,<sup>13</sup> nor are the private instructions given by a client to his attorney binding on third persons who have no notice or knowledge of them.<sup>14</sup> So, the acts of an attorney outside the apparent scope of his authority will not bind his client.<sup>15</sup> The assumption by an attorney at law, even if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings in courts, does not create any presumption of actual authority so to act, but his acts must be shown to be within the scope of his authority, else they will not bind his principal.<sup>16</sup> It is incompetent to prove a custom among attorneys to take full and complete control over the business of foreign clients, and to exercise discretionary power in its settlement in violation of the principles of law, or contrary to the interests of clients.<sup>17</sup>

**§ 247. Bringing and Defending Suits, and Matters Incidental Thereto.** — The authority of an attorney to bring or defend an action, and to do on behalf of his client, in connection with the prosecution or defense of litigation, such things as are neces-

<sup>11</sup> *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382.

<sup>12</sup> *Beale v. Swasey*, 106 Me. 35, 20 Ann. Cas. 396, 75 Atl. 134.

<sup>13</sup> *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. 1073.

<sup>14</sup> *W. W. Kimball Co. v. Payne*, 9 Wyo. 441, 64 Pac. 673.

<sup>15</sup> *United States v. Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264.

*Illinois.*—*Nolan v. Jackson*, 16 Ill. 272; *Chicago, W. & V. Coal Co. v. Balmer*, 45 Ill. App. 59.

*Michigan.*—*Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454; *Stewart v.*

*Sprague*, 71 Mich. 50, 38 N. W. 673.

*Minnesota.*—*Erskine v. McIlrath*, 60 Minn. 485, 62 N. W. 1130.

*Missouri.*—*State v. Muench*, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536.

*Nebraska.*—*Anderson v. Henrickson*, 1 Neb. (unofficial) Rep. 610, 95 N. W. 844.

<sup>16</sup> *Horseshoe Min. Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213. See also *Stone v. Bank of Commerce*, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028.

<sup>17</sup> *Clark v. Kingsland*, 1 Smedes & M. (Miss.) 248.

sary to accomplish the purposes of his employment, has been considered generally in the preceding sections of this subdivision,<sup>18</sup> and where an attorney acts under the express direction of his client no further discussion is deemed necessary;<sup>19</sup> the implied authority of an attorney to bring or to defend an action, however, depends on the facts presented by the individual case. Where both state and federal courts have concurrent jurisdiction of a cause of action the attorney may, in the exercise of a sound discretion, bring the action in either court, especially where he has not been instructed by his client in this respect.<sup>20</sup> So, an attorney having charge of a claim may transfer it from the action and decision of such judges as the client has in the first place selected, and submit it to the decision of other persons, and, in the absence of proof to the contrary, the legal presumption is that he acted by authority of the client.<sup>1</sup> An attorney employed to collect a claim has authority to do all necessary acts for the furtherance of his client's interests;<sup>2</sup> thus he may bring suit on the claim,<sup>3</sup> or he may issue an attachment thereon,<sup>4</sup> but he cannot sue on the claim in his own

<sup>18</sup> See *supra*, §§ 199, 229, 246, and the cross-references therein given at notes.

<sup>19</sup> See *Girard v. Hirsch*, 6 La. Ann. 651 (wherein counsel acted under a power of attorney). See also *Com. v. Louisville Property Co.*, 128 Ky. 790, 109 S. W. 1183, 33 Ky. L. Rep. 225, wherein counsel acted under a contract of employment.

A general authority to commence suits will authorize an attorney to commence a suit and attach property. *Fairbanks v. Stanley*, 18 Me. 296.

When a town enacts a by-law providing for a law committee, consisting of the principal town officers, and authorizing them to elect a town solicitor "to prosecute all litigation to which the town is a party," and, if need be, employ special counsel, an action brought by an attorney on behalf of the town on the order of such

committee is the action of the town. *Clinton v. Heagney*, 175 Mass. 134, 55 N. E. 894.

<sup>20</sup> *McGeorge v. Bigstone Gap Imp. Co.*, 88 Fed. 599.

<sup>1</sup> *Jones v. Horsey*, 4 Md. 306. 59 Am. Dec. 81.

<sup>2</sup> *Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147; *Burgess v. Stevens*, 76 Me. 559; *Alden v. W. J. Dyer & Bro.*, 92 Minn. 134, 99 N. W. 784; *Levy v. Brown*, 56 Miss. 90.

<sup>3</sup> *Alden v. W. J. Dyer & Bro.*, 92 Minn. 134, 99 N. W. 784; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 315.

*Bringing Second Suit.*—An attorney who receives a note for collection is authorized, by his general retainer, to bring a second suit on the note, after being nonsuited in the first for want of due proof of the execution of the note. *Scott v. Elmendorf*, 12 Johns. (N. Y.) 315.

<sup>4</sup> *Pierce v. Strickland*, 2 Story

name,<sup>5</sup> nor does authority to institute legal proceedings for the collection of a debt warrant the institution of a criminal prosecution.<sup>6</sup> The possession of a note by the attorney for a party is possession by the party, in so far as the right to sue thereon is concerned.<sup>7</sup> So a county solicitor may, without an express direction, procure a mandamus against a municipality to compel the levy of a tax to pay a debt due the county.<sup>8</sup> An attorney may also do all things incidental to the prosecution or defense of the suit, and which affect the remedy only, and not the cause of action;<sup>9</sup> thus he may agree to an amicable action,<sup>10</sup> or agree that a change of venue shall not be taken;<sup>11</sup> and where, by statute, the original writ must be indorsed by the plaintiff, an attorney authorized to commence an action may indorse his client's name on the writ;<sup>12</sup> and it has been held that the authority of the defendant's attorney is competent to restore an action after *non pros.* without the consent of his client.<sup>13</sup> So, an attorney employed by a nonresident to recover specific personal property has authority to receive it for his client.<sup>14</sup> But in conducting legal proceedings, as in all other mat-

292, 19 Fed. Cas. No. 11,147; *Kirksey v. Jones*, 7 Ala. 623.

<sup>5</sup> *Bryant v. Owen*, 1 Port. (Ala.) 201.

<sup>6</sup> *Thompson v. Beacon Val. Rubber Co.*, 56 Conn. 493, 16 Atl. 554.

<sup>7</sup> *Kunkel v. Spooner*, 9 Md. 462, 66 Am. Dec. 332.

<sup>8</sup> *People v. Kingston*, 101 N. Y. 82, 4 N. E. 348.

<sup>9</sup> *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382. See also *supra*, § 246.

*Incidental Condemnation Proceedings.*—Where a statute creating a public park declared that the tracts of land taken for park purposes should be "public places," an addition to the park afterwards made was also a public place, and hence an agreement of retainer whereby an attorney was engaged to take all lawful proceedings to obtain compensation for lands, etc., proposed to be taken for the opening of streets, ave-

nues, and "public places," embraced proceedings to condemn land for an addition to the park. In re *Robbins*, 189 N. Y. 422, 82 N. E. 501, reversing 119 App. Div. 888, 105 N. Y. S. 1140.

<sup>10</sup> *Cook v. Gilbert*, 8 Serg. & R. (Pa.) 567; *Whitcomb v. Kephart*, 50 Pa. St. 85; *Van Beil v. Shive*, 17 Phila. (Pa.) 104, 41 Leg. Int. 154; *Wilmington Mills Mfg. Co. v. Gardner*, 2 W. N. C. (Pa.) 486.

<sup>11</sup> *Terre Haute Brewing Co. v. Ward*, (Ind.) 102 N. E. 395.

<sup>12</sup> *Chadwick v. Upton*, 3 Pick. (Mass.) 442; *Johnson v. Sprague*, 183 Mass. 102, 66 N. E. 422; *Miner v. Smith*, 6 N. H. 219.

*Contra.*—*Harmon v. Watson*, 8 Greenl. (Me.) 286. See also *Weathers v. Ray*, 4 Dana (Ky.) 474.

<sup>13</sup> *Reinholdt v. Alberti*, 1 Bin. (Pa.) 469.

<sup>14</sup> *W. W. Kimball Co. v. Payne*, 9 Wyo. 441, 64 Pac. 673.



an attorney was authorized to institute or defend a suit presents a question of fact.<sup>4</sup>

**§ 248. Control of Proceedings in Court.** — The general rule is that an attorney retained to conduct proceedings in court has exclusive control thereof,<sup>5</sup> and this is especially true as to matters of procedure.<sup>6</sup> An attorney at law is *ex officio* authorized to do

<sup>4</sup> *Nutt v. Merrill*, 40 Me. 237.

<sup>5</sup> *United States*.—*Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 341, 18 Fed. Cas. No. 10,264; *Bonnifield v. Thorp*, 71 Fed. 924. See also *Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147; *Gordon v. Coolidge*, 1 Sumn. 537, 10 Fed. Cas. No. 5,606. *California*.—*Funded Debt. Com'rs v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Mott v. Foster*, 45 Cal. 72; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809.

*Connecticut*. — *Monson v. Hawley*, 30 Conn. 51, 79 Am. Dec. 233.

*Indiana*.—*McConnell v. Brown*, 40 Ind. 384; *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117.

*Louisiana*.—See *Simpson v. Lombas*, 14 La. Ann. 103.

*Maine*.—*Jenney v. Delesdernier*, 20 Me. 191.

*Massachusetts*.—*Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

*Missouri*.—*McDonough v. Daly*, 3 Mo. App. 606.

*New Hampshire*.—*Edgerton v. Brackett*, 11 N. H. 218.

*New York*.—Anonymous, 1 Wend. 108; *Gaillard v. Smart*, 6 Cow. 385. See also *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335; *Ford v. Williams*, 13 N. Y. 584, 67 Am. Dec. 83.

*Pennsylvania*.—*Kissick v. Hunter*, 184 Pa. St. 174, 39 Atl. 83.

And see the following section.

<sup>6</sup> *United States*.—*Putnam v. Day*, 22 Wall. 60, 22 U. S. (L. ed.) 764.

*Massachusetts*.—*De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938.

*Mississippi*.—*Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 501, 52 So. 143, reversing 95 Miss. 497, 51 So. 274.

*New Hampshire*.—*Edgerton v. Brackett*, 11 N. H. 218.

*New York*.—*Devlin v. New York*, 15 Abb. Pr. N. S. 31.

*Pennsylvania*.—*Munley v. Sugar Notch Borough*, 215 Pa. St. 228, 64 Atl. 377.

*South Dakota*. — *Dalbckermeyer v. Scholtes*, 3 S. D. 183, 52 N. W. 871.

*Wisconsin*.—*Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

*But an attorney authorized merely to prepare a petition appropriate to the procurement of letters of administration, has no authority to describe particularly the property belonging to the decedent's estate; and a description of such property in the petition prepared by him is not binding on the client as an admission.* *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

*Should Examine Proceedings*.—An attorney on being retained for a defendant should examine the state of the proceedings, though it is fair practice for the plaintiff's attorney

ters, an attorney's acts outside of the apparent scope of his authority will not bind his client;<sup>15</sup> thus a city attorney cannot bring the corporation into court by filing a brief in a case in which the city is not impleaded;<sup>16</sup> so authority to bring an action of attachment does not authorize the attorney to appear for the attachment plaintiff in a suit against him to recover damages for unlawfully bringing the attachment.<sup>17</sup> An attorney employed to defend a suit removed from a justice's court to the common pleas by certiorari has no authority, by virtue of his retainer for that purpose, to bring a suit in the name of his client against the obligors in the bond given upon obtaining the certiorari.<sup>18</sup> Nor does employment in the principal case give an attorney authority to appear in a suit for contempt.<sup>19</sup> Where the defendant is sued as an individual, it will not be presumed that his attorney has authority to consent to an amendment of the complaint seeking to recover against him as a receiver.<sup>20</sup> Authority conferred upon an attorney to sue for specific performance of a contract or to quiet the title to real estate does not include authority to sue only for rescission of the contract on which his client's right or claim is founded.<sup>1</sup> Counsel who undertake to defend a client in a criminal prosecution do not thereby agree to defend his bailors upon a scire facias on the recognizance.<sup>2</sup> An attorney for a decedent's estate should not place himself on record as a petitioner for orders except in cases of urgent necessity.<sup>3</sup> A conflict of evidence as to whether

<sup>15</sup> *In re Cameto*, Myr. Prob. (Cal.) 75; *McCutcheon v. Loud*, 71 Mich. 433, 39 N. W. 569; *McDowell v. Gregory*, 14 Neb. 33, 14 N. W. 899; *Allen v. Stone*, 10 Barb. (N. Y.) 547.

A case commenced without the authority of an infant for whom no guardian *ad litem* was appointed should be dismissed on motion, though opposed by the attorney of record. *Herman v. New York City R. Co.*, 122 App. Div. 469, 106 N. Y. S. 896.

<sup>16</sup> *People v. Hatch*, 60 Mich. 229, 26 N. W. 860.

<sup>17</sup> *Barnes v. Proflet*, 5 La. Ann. 117.

<sup>18</sup> *Walradt v. Maynard*, 3 Barb. (N. Y.) 584.

<sup>19</sup> *Pitt v. Davison*, 37 Barb. (N. Y.) 97.

<sup>20</sup> *Erskine v. McIlrath*, 60 Minn. 485, 62 N. W. 1130.

<sup>1</sup> *Neill v. McClung*, (W. Va.) 76 S. E. 878.

<sup>2</sup> *Headley v. Good*, 24 Tex. 235.

<sup>3</sup> *In re McCullough*, 5 Pa. Co. Ct. 87.



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**§ 248. Control of Proceedings in Court.** — The general rule is that an attorney retained to conduct proceedings in court has exclusive control thereof,<sup>5</sup> and this is especially true as to matters of procedure.<sup>6</sup> An attorney at law is *ex officio* authorized to do

<sup>4</sup> *Nutt v. Merrill*, 40 Me. 237.

<sup>5</sup> *United States*.—*Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 341, 18 Fed. Cas. No. 10,264; *Bonnifield v. Thorp*, 71 Fed. 924. See also *Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147; *Gordon v. Coolidge*, 1 Sumn. 537, 10 Fed. Cas. No. 5,606. *California*.—*Funded Debt. Com'rs v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Mott v. Foster*, 45 Cal. 72; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 800.\*

*Connecticut*.—*Monson v. Hawley*, 30 Conn. 51, 79 Am. Dec. 233.

*Indiana*.—*McConnell v. Brown*, 40 Ind. 384; *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117.

*Louisiana*.—See *Simpson v. Lombas*, 14 La. Ann. 103.

*Maine*.—*Jenney v. Delesdernier*, 20 Me. 191.

*Massachusetts*.—*Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

*Missouri*.—*McDonough v. Daly*, 3 Mo. App. 606.

*New Hampshire*.—*Edgerton v. Brackett*, 11 N. H. 218.

*New York*.—Anonymous, 1 Wend. 108; *Gaillard v. Smart*, 6 Cow. 385. See also *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335; *Ford v. Williams*, 13 N. Y. 584, 67 Am. Dec. 83.

*Pennsylvania*.—*Kissick v. Hunter*, 184 Pa. St. 174, 39 Atl. 83.

And see the following section.

<sup>6</sup> *United States*.—*Putnam v. Day*, 22 Wall. 60, 22 U. S. (L. ed.) 764.

*Massachusetts*.—*De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938.

*Mississippi*.—*Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 501, 52 So. 143, reversing 95 Miss. 497, 51 So. 274.

*New Hampshire*.—*Edgerton v. Brackett*, 11 N. H. 218.

*New York*.—*Devlin v. New York*, 15 Abb. Pr. N. S. 31.

*Pennsylvania*.—*Munley v. Sugar Notch Borough*, 215 Pa. St. 228, 64 Atl. 377.

*South Dakota*.—*Dalbckermeyer v. Scholtes*, 3 S. D. 183, 52 N. W. 871.

*Wisconsin*.—*Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

*But an attorney authorized merely to prepare a petition appropriate to the procurement of letters of administration, has no authority to describe particularly the property belonging to the decedent's estate; and a description of such property in the petition prepared by him is not binding on the client as an admission.* *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570.

*Should Examine Proceedings*.—An attorney on being retained for a defendant should examine the state of the proceedings, though it is fair practice for the plaintiff's attorney

all acts necessary and incidental to the management of the suit, and which affect the remedy only and not the cause of action.<sup>7</sup> When one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand; and consequently whatever proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted.<sup>8</sup> The temporary absence of an attorney from the county does not alter the rule that he has exclusive management and control of the case.<sup>9</sup> But this exclu-

to disclose them. *Steele v. Tennent*, 1 Cai. (N. Y.) 68, Col. & C. Cas. 169.

<sup>7</sup> *United States*.—*Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147.

*Massachusetts*.—*Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72.

*Minnesota*.—*Eickman v. Troll*, 29 Minn. 124, 12 N. W. 347.

*Missouri*.—*Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Mignogna v. Chiafarelli*, 151 Mo. App. 359, 131 S. W. 769.

*New York*.—*Poucher v. Blanchard*, 80 N. Y. 256.

*North Dakota*.—*Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L.R.A. (N.S.) 244.

*South Carolina*.—*Brooks v. Brooks*, 16 S. C. 621.

*South Dakota*.—*Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

*Separation of Jury*.—Where, upon the submission of a civil case, the jury are instructed regarding their duties during any separation that might take place before their deliberations are concluded, and the at-

torneys for both parties afterward assented to a proposal made by the court that the jury be permitted to separate for a definite time, the proposal being made under such circumstances and stated in such terms that the court was justified in understanding that the attorneys consented to the jury's being dismissed by the bailiff in the absence of the judge, the objection that the jury were not given an additional admonition before such separation is not available on review. *Fields v. Dewitt*, 71 Kan. 676, 6 Ann. Cas. 349, 81 Pac. 467.

\* *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.

Thus a client is bound by the direction of his attorney, indorsed on an affidavit in claim and delivery, requiring the officer to take the property described in the affidavit from the defendant and deliver the same to the plaintiff, though the property in fact belonged to a third person. *Feury v. McCormick Harvesting Mach. Co.*, 6 S. D. 396, 61 N. W. 162.

<sup>9</sup> *Mott v. Foster*, 45 Cal. 72.

sive control is to a certain extent subject to supervision by the court; thus if counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the court has authority to overrule the action of the advocate.<sup>10</sup>

**§ 249. Excluding Control by Client.**—The general rule is, that while a party to an action may appear in his own proper person, or by attorney, he cannot do both; and where he has retained an attorney who appears of record for him, he can act only through such attorney, and the court cannot recognize any other person in the management or control of the action.<sup>11</sup> The client has no right whatever to interfere with his attorney in the due and orderly conduct of the suit,<sup>12</sup> nor can he constitute or authorize an agent to do so.<sup>13</sup> But the parties to an action may, in the absence of fraud and collusion, settle and adjust the same without the intervention of their attorneys;<sup>14</sup> questions of this character usually arise in actions by attorneys for compensation, or for the enforcement of a lien, and will be more fully considered under those heads.<sup>15</sup> Under a California statute it has been held that while

<sup>10</sup> *Matthews v. Munster*, 20 Q. B. D. (Eng.) 141, 57 L. J. Q. B. 49, 57 L. T. N. S. 922, 36 W. R. 178, 52 J. P. 260.

<sup>11</sup> *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264; *Funded Debt Com'rs v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809; *Boca & L. R. Co. v. Superior Court*, 150 Cal. 153, 88 Pac. 718; *Webb v. Dill*, 18 Abb. Pr. (N. Y.) 264.

<sup>12</sup> *Kern v. Chicago, etc., R. Co.*, 201 Fed. 404; *Anonymous*, 1 Wend. (N. Y.) 108; *Ulster County v. Brodhead*, 44 How. Pr. (N. Y.) 426; *Read v. French*, 28 N. Y. 285.

<sup>13</sup> *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264.

<sup>14</sup> *Indiana*.—*Miedreich v. Bank*, 40 Ind. App. 393, 82 N. E. 117.

*New York*.—*Roberts v. Doty*, 31 Hun 128; *Root v. Van Duzen*, 32 Hun 63; *Reeder v. Lockwood*, 30 Misc. 531, 62 N. Y. S. 713; *Pilger v. Gou*, 21 How. Pr. 155; *McBratney v. Rome*, W. & O. R. Co., 87 N. Y. 467.

*Oregon*.—*Wagner v. Goldschmidt*, 51 Ore. 63, 93 Pac. 689.

*Tennessee*.—*Yoakley v. Hawley*, 5 Lea 670.

The parties to a judgment can stipulate for dismissal of an appeal therefrom without the aid or intervention of their counsel. *Humtulpis Driving Co. v. Cross*, 65 Wash. 636, 118 Pac. 827, 37 L.R.A. (N.S.) 226.

<sup>15</sup> As to the right to compensation when the action has been settled by the client, see *infra*, §§ 456-460.

there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney.<sup>16</sup>

**§ 250. Dismissal, Discontinuance, and Retraxit.** — It is well settled that an attorney may dismiss a suit by virtue of his general authority; <sup>17</sup> so, power given by statute to a party to dismiss a suit may be exercised by his attorney.<sup>18</sup> But, even though it is justified, the court does not approve the practice of a lawyer dismissing a case without the knowledge and consent of his client,<sup>19</sup> and it has been held that he has no authority to dismiss it contrary to the desire and over the objection of his client.<sup>1</sup> An attorney may also enter a discontinuance without express authority.<sup>2</sup> The foregoing rules result from the fact that the attorney has the

As to the right to a lien under similar circumstances, see *infra*, §§ 640-645.

<sup>16</sup> *Boca & L. R. Co. v. Superior Court*, 150 Cal. 153, 88 Pac. 718.

<sup>17</sup> *California*.—*McLeran v. McNamara*, 55 Cal. 508.

*Connecticut*.—*Union Mfg. Co. v. Pitkin*, 14 Conn. 174.

*Iowa*.—*Contra Rhutasel v. Rule*, 97 Iowa 20, 65 N. W. 1013.

*Minnesota*.—*Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523.

*Missouri*.—*Davis v. Hall*, 90 Mo. 659, 3 S. W. 382.

*Montana*.—*Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716.

*New York*.—*Gaillard v. Smart*, 6 Cow. 385; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628.

*North Dakota*.—*Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.

*Ohio*.—*Lowellville Coal Min. Co. v. Zappio*, 80 Ohio St. 458, 89 N. E. 97.

*Tennessee*.—*Yoakley v. Hawley*, 5

Lea 670; *Stephens v. Nashville, etc., R. Co.*, 10 Lea 448.

*Texas*.—*Seeligson v. Gifford*, 46 Tex. Civ. App. 566, 103 S. W. 416.

*Washington*.—*Simpson v. Brown*, 1 Wash. Ter. 248.

<sup>18</sup> *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382; *Seeligson v. Gifford*, 46 Tex. Civ. App. 566, 103 S. W. 416.

<sup>19</sup> *The Zilpha*, 40 Ct. Cl. 200.

<sup>1</sup> *Steinkamp v. Gaebel*, 1 Neb. (unofficial) Rep. 480, 95 N. W. 684. See also *Kurrus v. Mayo*, 4 Ill. App. 106.

<sup>2</sup> *Illinois*.—*Gillett v. Booth*, 6 Ill. App. 423.

*Louisiana*.—*Paxton v. Cobb*, 2 La. 137.

*Missouri*.—*Davis v. Hall*, 90 Mo. 659, 3 S. W. 382.

*New York*.—*Gaillard v. Smart*, 6 Cow. 385; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628.

*Texas*.—*Seeligson v. Gifford*, 46 Tex. Civ. App. 566, 103 S. W. 416.

*Washington*.—*Simpson v. Brown*, 1 Wash. Ter. 247.

Where the plaintiff's attorney told the attorney for the defendant that

free and full control of a case in its ordinary incidents—the exclusive conduct and management of the suit;<sup>3</sup> and the question as to whether an action shall be dismissed relates to the conduct of the suit and to the remedy, and is one peculiarly addressed to the skill, knowledge and judgment of the attorney. When the alternative is presented of a probable defeat upon the merits, or a dismissal without prejudice, thus saving the cause of action, it is for the attorney to decide, as one of the incidents of the trial, in the performance of his duty to his client, which course to pursue.<sup>4</sup> But the general authority of an attorney does not include power to enter voluntarily, or cause to be entered, an order that perpetually bars the right of his client, such as retraxit. Such an act can be done only by the party in person, or by his attorney in pursuance of special authority conferred upon him for that purpose.<sup>5</sup> It has been held in some states, however, under statutes

a cause was discontinued, and, being requested by the latter to enter a rule to discontinue, said it was not necessary, and, in consequence, the defendant, with the consent of his special bail, went to Europe, whereupon, no rule being entered, the plaintiffs afterwards proceeded with the cause, it was held that a discontinuance was within the general power of an attorney, and hence a discontinuance would be entered on defendant's motion. *Gaillard v. Smart*, 6 Cow. (N. Y.) 385.

But it has also been held that the fact that an attorney received an order from his client requesting the dismissal of an action, does not require the attorney to enter such dismissal on motion of the adverse party. *McConnell v. Brown*, 40 Ind. 384.

<sup>3</sup> See *supra*, § 246.

<sup>4</sup> *Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L.R.A.(N.S.) 244.

<sup>5</sup> *England*.—*Coux v. Lowther*, 1 Ld.

Raym. 597; *Lamb v. Williams*, 1 Salk. 89.

*Alabama*.—*Thompson v. Odum*, 31 Ala. 108, 68 Am. Dec. 159.

*Colorado*.—*Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568.

*Indiana*.—*Lambert v. Sandford*, 2 Blackf. 137, 18 Am. Dec. 149.

*Kentucky*.—*Harris v. Tiffany*, 8 B. Mon. 225.

*Montana*.—*Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716.

*New Jersey*.—*Waldron v. Angelman*, 71 N. J. L. 166, 58 Atl. 568.

*New York*.—*Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335.

*Pennsylvania*.—*Lowry v. McMillan*, 8 Pa. St. 157, 49 Am. Dec. 501.

*Texas*.—*Hickey v. Stringer*, 3 Tex. Civ. App. 45, 21 S. W. 716.

*Vermont*.—*Sheffer v. B. B. Perkins & Co.*, 83 Vt. 185, 75 Atl. 6, 25 L.R.A.(N.S.) 1313.

*Virginia*.—*Smith v. Lambert*, 7 Grat. 138.

regulating the powers of attorneys and counselors at law, that an attorney has authority to enter a retraxit.<sup>6</sup> The right of an attorney to compromise, waive, or release his client's cause of action or other substantial right has been considered in the places indicated by the subjoined note.<sup>7</sup>

**§ 251. Authority to Make Affidavit for Client.** — In the absence of statutory regulation to the contrary, an attorney may make an affidavit for his client, providing he has sufficient knowledge of the facts;<sup>8</sup> in such case, however, the affidavit should show the reason for the party's failure to make it personally,<sup>9</sup> though in some states no such showing is required,<sup>10</sup> the attorney's

*West Virginia.*—*Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

<sup>6</sup> *Funded Debt Com'rs v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Merritt v. Campbell*, 47 Cal. 542; *Westbay v. Gray*, 116 Cal. 665, 48 Pac. 800; *Barnard v. Daggett*, 68 Ind. 305.

<sup>7</sup> As to compromise, see *supra*, §§ 215-226. As to release, see *supra*, §§ 227, 228. As to waiver of client's substantial rights, see *infra*, § 263.

<sup>8</sup> *United States.*—*The Brig Harriet*, Olc. Adm. 222, 11 Fed. Cas. No. 6,096.

*California.*—*Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

*Colorado.*—*Daum v. Conley*, 27 Colo. 56, 59 Pac. 753.

*Florida.*—*Seaboard Air Line R. Co. v. Southern Investment Co.*, 53 Fla. 832, 13 Ann. Cas. 18, 44 So. 351.

*Georgia.*—*Murphy v. Winter*, 18 Ga. 690.

<sup>9</sup> *California.*—*Byrne v. Alas*, 68 Cal. 479, 9 Pac. 850; *Will v. Lytle Creek Water Co.*, 100 Cal. 344, 34 Pac. 830; *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

*Illinois.*—*Lockhart v. Wolf*, 82 Ill. 37.

*Iowa.*—*Widner v. Hunt*, 4 Iowa 355.

*Kentucky.*—*Clark v. Miller*, 88 Ky. 103, 10 S. W. 277. See also *Johnson v. Johnson*, 31 Fed. 700 (decided under Kentucky statute).

*Louisiana.*—*Williams v. Brashear*, 16 La. 77; *Beatty v. Tete*, 9 La. Ann. 129; *Schneider v. Vercker*, 11 La. Ann. 274.

*New York.*—*Roosevelt v. Dale*, 2 Cow. 581; *Philips v. Blagge*, 3 Johns. 141; *Field v. New York Cent. & H. R. R. Co.*, 35 Misc. 111, 71 N. Y. S. 220; *Cross v. National F. Ins. Co.*, 17 Civ. Pro. 199, 6 N. Y. S. 84; *Clark v. Sullivan*, 55 Hun 604 mem, 8 N. Y. S. 565; *Van Ingen v. Herold*, 64 Hun 637 mem, 19 N. Y. S. 456; *Talbert v. Storum*, 66 Hun 635 mem, 21 N. Y. S. 719; *Cohn v. Baldwin*, 74 Hun 346, 26 N. Y. S. 457.

*Wisconsin.*—*Sloane v. Anderson*, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

<sup>10</sup> *Arkansas.*—*Mandel v. Peet*, 18 Ark. 244.

*Louisiana.*—*Simpson v. Lombas*, 14 La. Ann. 103.

*Massachusetts.*—*Wright v. Coles*, 11 Metc. 293.

authority being presumed, or provable by extrinsic evidence.<sup>11</sup> Some statutes require an affidavit to be made by the party personally, and in such cases the oath of the attorney is ordinarily insufficient;<sup>12</sup> but, notwithstanding such statutes, it is apparent that a party's illness or unavoidable absence would necessitate the receiving of the affidavit of an attorney or other agent in behalf of the litigant, in the interest of justice, where the affiant's knowledge, and the party's inability to act, were satisfactorily shown to the court. Thus, for instance, it is not likely that the court would require a party to make an affidavit where he was suffering from a contagious disease, or, possibly, where he was a resident of a building, or even vicinity, in which other persons were so afflicted.

**§ 252. Authority to Incur Expense.**—There can be no doubt of the authority of an attorney, in the conduct and management of his client's case, to make such necessary and proper disbursements as the case shall require. This authority can be implied from the relation of attorney and client, from which a

*Michigan.*—Stringer v. Dean, 61 Mich. 196, 27 N. W. 886.

*Minnesota.*—Smith v. Victorin, 54 Minn. 338, 56 N. W. 47.

*Nevada.*—Streeter v. Johnson, 23 Nev. 194, 44 Pac. 819.

<sup>11</sup> Gilkeson v. Knight, 71 Mo. 405; Melcher v. Scruggs, 72 Mo. 406; Ring v. Charles Vogel Paint, etc., Co., 46 Mo. App. 374; Sato v. Hubbard, 8 Ont. Pr. 445.

<sup>12</sup> *Colorado.*—Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187.

*District of Columbia.*—Martin v. Martin, etc., Co., 27 App. Cas. 59, 7 Ann. Cas. 47.

*Georgia.*—Elder v. Whitehead, 25 Ga. 262; Hadden v. Iarned, 83 Ga. 636, 10 S. E. 278.

*Maryland.*—Didier v. Kerr, 12 Gill & J. 499.

*Missouri.*—Lewin v. Dille, 17 Mo. 64; Bryant v. Harding, 29 Mo. 347; Huthsing v. Maus, 36 Mo. 101; Norvell v. Porter, 62 Mo. 309; Matter of Whitson, 89 Mo. 58, 1 S. W. 125; Raming v. Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Clements v. Greenwell, 40 Mo. App. 589.

*New York.*—Pach v. Geoffroy, 65 Hun 619 mem., 19 N. Y. S. 583; People v. Spalding, 2 Paige 326.

*North Carolina.*—Sheppard v. Cook, 3 N. C. 241.

**Duty to Make Affidavits.**—Where defendant is unavoidably absent from trial of the cause, it is not the duty of the attorney to make affidavits—such as one for a continuance, or new trial. Spencer v. Kinnard, 12 Tex. 180.

request on the part of the client will be presumed.<sup>13</sup> It is equally true that, however necessary the services might be regarded by the attorney in the client's interest, the client has a right to refuse to incur the expense of them, and the attorney cannot charge the client, except in favor of some one who acted upon the presumed authority with which such attorney was clothed;<sup>14</sup> were it otherwise an attorney might compel the client to pay any and all sums, however much beyond the means or inclination of the client in a particular case, and notwithstanding the person towards whom the obligation was incurred had notice of the restricted or questionable right of the attorney.<sup>15</sup> Within these principles an attorney may bind his client by a contract for the printing of briefs to be used in a case in which he is employed,<sup>16</sup> and, where he has

<sup>13</sup> *California*.—See *Alexander v. Denaveaux*, 53 Cal. 663; *Alexander v. Denaveaux*, 59 Cal. 476.

*Illinois*.—Geo. Hornstein Co. v. Crandall, 156 Ill. App. 520. See also *Hughes v. Zeigler*, 69 Ill. 38.

*Indiana*.—Palmer v. Miller, 19 Ind. App. 624, 49 N. E. 975, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107.

*Iowa*.—Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023; *Forbes v. Chicago, etc., R. Co.*, 150 Ia. 177, Ann. Cas. 1912D 311, 129 N. W. 810.

*Louisiana*.—See *Weisse v. New Orleans*, 10 La. Ann. 46.

*Missouri*.—Williamson Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534; *Shuck v. Pfennighausen*, 101 Mo. App. 697, 74 S. W. 381.

*Nevada*.—Feusier v. Virginia City, 3 Nev. 58.

*New York*.—Judson v. Gray, 11 N. Y. 408; *Bonynge v. Field*, 81 N. Y. 159; *Bonynge v. Waterbury*, 12 Hun 534; *Sheridan v. Genet*, 12 Hun 660; *Covell v. Hart*, 14 Hun 252; *Thornton v. Tuttle*, 44 Hun 624 mem., 7 N. Y. St. Rep. 801; *Brown v. Travelers'*

*Life & Accident Ins. Co.*, 21 App. Div. 42, 47 N. Y. S. 253; *Badger v. Celler*, 41 App. Div. 599, 58 N. Y. S. 653; *Argus Co. v. Hotchkiss*, 121 App. Div. 379, 107 N. Y. S. 138; *Tyrrel v. Hammerstein*, 33 Misc. 505, 67 N. Y. S. 717; *Foland v. Dayton*, 20 N. Y. Wkly. Dig. 59; *Mulligan v. Cannon*, 25 Civ. Proc. 348, 41 N. Y. S. 279; *Howell v. Kinney*, 1 How. Pr. 105; *Harry v. Hilton*, 64 How. Pr. 199. See also *Packard v. Stephani*, 85 Hun 197, 32 N. Y. S. 1016; *Livingston Middleditch Co. v. New York Dentistry College*, 31 Misc. 259, 64 N. Y. S. 140; *Gibbs v. Prindle*, 11 App. Div. 470, 42 N. Y. S. 329. Compare *Livingston Middleditch Co. v. New York College of Dentistry*, 30 Misc. 831, 61 N. Y. S. 918.

*Wisconsin*.—Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812.

*Wyoming*.—W. W. Kimball Co. v. Payne, 9 Wyo. 441, 64 Pac. 673.

<sup>14</sup> *Packard v. Stephani*, 85 Hun 197, 32 N. Y. S. 1016.

<sup>15</sup> *Packard v. Stephani*, 85 Hun 197, 32 N. Y. S. 1016.

<sup>16</sup> *Illinois*.—Hornstein Co. v. Crandall, 156 Ill. App. 520.



other clients jointly interested in the same case, he may make them jointly liable for such payment, provided the expense to each is not increased.<sup>17</sup> It is also within the scope of an attorney's authority to employ a stenographer.<sup>18</sup> So, an attorney may bind his client for the payment of service fees,<sup>19</sup> or the fees of a referee,<sup>20</sup> or commissioner.<sup>1</sup> Whether the attorney may bind his client for his personal expenses while attending to the client's business must obviously depend largely on the terms of the contract,<sup>2</sup> or

*Louisiana*.—Weisse v. New Orleans, 10 La. Ann. 46.

*Massachusetts*.—Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72.

*Missouri*.—Williamson Stewart Paper Co. v. Boshyshell, 14 Mo. App. 534; Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512.

*New York*.—Allison v. Scheeper, 9 Daly 365; Argus Co. v. Hotchkiss, 121 App. Div. 378, 107 N. Y. S. 138; Livingston Middleditch Co. v. New York College of Dentistry, 31 Misc. 250, 7 N. Y. Ann. Cas. 398, 64 N. Y. S. 140, affirming 30 Misc. 831, 61 N. Y. S. 918; Tyrrel v. Hammerstein, 33 Misc. 505, 8 N. Y. Ann. Cas. 432, 67 N. Y. S. 717.

*Tennessee*.—Sanders v. Riddick, 156 S. W. 464.

<sup>17</sup> Williamson Stewart Paper Co. v. Boshyshell, 14 Mo. App. 534.

<sup>18</sup> *Indiana*.—Hogate v. Edwards, 65 Ind. 372; Miller v. Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107.

*New York*.—Bonyng v. Field, 81 N. Y. 150; Bonyng v. Waterbury, 12 Hun 534; Sheridan v. Genet, 12 Hun 660; Thornton v. Tuttle, 44 Hun 624 mem., 7 N. Y. St. Rep. 801; Bottome v. Neely, 54 Misc. 258, 104 N. Y. S. 429; Thornton v. Tuttle, 20 Abb. N. Cas. 308, 7 N. Y. St. Rep. 801; Harry v. Hilton, 64 How. Pr. 199, 11 Abb. N. Cas. 448.

*Compare* Tobler v. Nevitt, 45 Colo. 231, 16 Ann. Cas. 925, 100 Pac. 416, 132 Am. St. Rep. 142, holding that where an attorney has no authority to prosecute an appeal or writ of error, he cannot bind his client to pay stenographer's fees for services rendered at the instance of the attorney in transcribing evidence to be used in prosecuting a review in the supreme court; and Bloomfield v. Nevitt, (Colo.) 131 Pac. 801, wherein it was held that an attorney who directed an official reporter to prepare a bill of exceptions, and who made no claim that he had authority to bind his client to pay therefor, was liable for the value of the reporter's services.

<sup>19</sup> Feusier v. Virginia City, 3 Nev. 58; Eastman v. Coos Bank, 1 N. H. 23.

<sup>20</sup> Howell v. Kinney, 1 How. Pr. (N. Y.) 105; Judson v. Gray, 11 N. Y. 408; Bottome v. Neely, 54 Misc. 258, 104 N. Y. S. 429.

<sup>1</sup> Fairchild v. Michigan Cent. R. Co., 8 Ill. App. 591.

<sup>2</sup> Where the contract of employment stipulated that all plaintiff's necessary expenses in conducting the business should be paid by defendant, plaintiff can recover only the amount of his expenses from his place of residence to the places where defendant's business called him, and

usage.<sup>3</sup> And an attorney authorized to institute replevin may bind his client to pay the expense of removing the property, when taken, to a place of safety.<sup>4</sup> So an attorney, retained in a criminal case, may incur reasonable expense for detective service,<sup>5</sup> but he cannot employ a detective who was formerly engaged by the adverse party in the same cause.<sup>6</sup> It has also been held in some cases that an attorney may employ expert witnesses at his client's expense,<sup>7</sup> and that one so employed may recover from the client, in the absence of evidence that he had notice of a limitation of the attorney's authority in this respect, or agreed to look solely to the attorney for compensation.<sup>8</sup> Where an attorney employed an expert to investigate the cause of the collapse of a building, the client's liability was submitted to the jury.<sup>9</sup> But the employment of an expert witness by an attorney does not render his client liable for the compensation of a witness who attends with knowledge that his services were not desired by the client,<sup>10</sup> or where the attorney had ample opportunity to confer with his client before he incurred such expense.<sup>11</sup> An attorney has no implied

not his expenses from some other place, where he was on other business, and from which he was summoned by defendant to conduct the cases mentioned in the contract. *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

<sup>3</sup> Whether an attorney from outside a county, employed to render services therein, can recover for hotel bills and other expenses in the county, depends on the usage therein. *Clark v. Ellsworth*, 104 Iowa 442, 73 N. W. 1023.

<sup>4</sup> *Fox v. William Deering & Co.*, 7 S. D. 443, 64 N. W. 520.

<sup>5</sup> *Kast v. Miller*, 158 Cal. 723, 115 Pac. 932.

<sup>6</sup> Where a detective employed by defendant in a divorce suit was formerly employed by plaintiff in that suit, but had severed his connection with the plaintiff, and the defendant's attorney became a party to a

contract with the detective to furnish evidence for the defendant as to the plaintiff's character, the attorney was held to be guilty of unprofessional conduct. *Murray v. Lizotte*, 31 R. I. 509, 77 Atl. 231.

As to representing conflicting interests generally, see *supra*, §§ 174-182.

<sup>7</sup> *Covell v. Hart*, 14 Hun (N. Y.) 252; *Mulligan v. Cannon*, 25 Civ. Proc. 348, 41 N. Y. S. 279; *Ross v. Niles*, 84 N. Y. S. 142.

<sup>8</sup> *Mulligan v. Cannon*, 25 Civ. Pro. 348, 41 N. Y. S. 279, *affirmed* 153 N. Y. 663, 48 N. E. 1105.

<sup>9</sup> *Brown v. Travelers' Life & Accident Ins. Co.*, 26 App. Div. 544, 50 N. Y. S. 729.

<sup>10</sup> *Packard v. Stephani*, 85 Hun 197, 32 N. Y. S. 1016.

<sup>11</sup> *Knight v. Buser*, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28,

authority, however, to instruct a sheriff to conduct a business, such as a restaurant, upon which an attachment has been levied, and thereby bind his client for the expenses incurred.<sup>12</sup> In several cases questions of this character have arisen in actions against the attorney for the recovery of expenses incurred by him on behalf of his client. These are considered in connection with the question of an attorney's personal liability.<sup>13</sup> Contingent fee contracts usually provide as to the payment of expenses, the interpretation of such contracts depending on the particular language.<sup>14</sup>

*Acceptance of Service of Process and Papers.*

§ 253. **Original Process.** — An attorney has no implied authority to accept or waive the service of original process issued against his client,<sup>15</sup> but in many jurisdictions it will be presumed, in the absence of proof to the contrary, that the acceptance of serv-

wherein it was held that when an attorney and his client reside in the same city, and can see and confer with each other at any time, the attorney is not authorized, by virtue of his general employment, to engage an expert, at the expense of his client, to aid him in the preparation of his case.

<sup>12</sup> *Alexander v. Denaveaux*, 53 Cal. 663.

<sup>13</sup> See *infra*, § 310.

<sup>14</sup> See *Whitlow v. Whitlow*, 109 Ky. 573, 60 S. W. 182, 22 Ky. L. Rep. 1179; *Browne v. West*, 9 App. Div. 135, 41 N. Y. S. 146, 75 N. Y. St. Rep. 604; *Thomas v. Morrison*, 92 Tex. 329, 48 S. W. 500, *modifying* 48 S. W. 46.

<sup>15</sup> *United States v. Shainwald v. Davida*, 69 Fed. 701.

*Connecticut*.—*Whitly v. Barker*, 1 Root 406.

*Florida*.—*Christopner v. Newnham*, 34 Fla. 370, 16 So. 274.

*Attys. at L. Vol. I.*—30.

*Massachusetts*.—*Kimball v. Sweet*, 170 Mass. 538, 51 N. E. 116.

*Minnesota*.—*Masterson v. Le Claire*, 4 Minn. 163.

*Missouri*.—*Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911.

*North Carolina*.—*Starr v. Hall*, 87 N. C. 381; *Warlick v. H. P. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657.

*Pennsylvania*.—*Com. v. Overseers of Poor*, 4 Kulp 87; *Bryn Mawr Nat. Bank v. James*, 152 Pa. St. 364, 25 Atl. 823; *McPherson v. McPherson*, 2 Leg. Chron. 342.

*South Carolina*.—*Reed v. Reed*, 19 S. C. 548.

*South Dakota*.—*Rice v. Bennett*, 137 N. W. 359.

*Washington*.—*Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161.

A corporation counsel cannot consent that the corporation be made a party to an action wherein it has not been served with process. *McGarry v. Supervisors of New York*, 7 Robt. (N. Y.) 464

ice of original process by an attorney was authorized.<sup>16</sup> Nor can such acceptance of service be collaterally attacked.<sup>17</sup> The presumption of authority only operates in the absence of evidence, and is entirely eliminated where the evidence for or against the special authority is before the court.<sup>18</sup> In some jurisdictions, under prevailing statutes, an attorney duly retained in a cause may accept service of process.<sup>19</sup> An unauthorized acceptance of service may also be ratified by the client and so rendered effective against him.<sup>20</sup> So, an attorney may be duly authorized to accept service of process and, in such case, the admission of service is binding

<sup>16</sup> *Georgia*.—Buice v. Lowman Gold, etc., Min. Co., 64 Ga. 769; Hendrix v. Cawthorn, 71 Ga. 742.

*Kansas*.—Hendrix v. Fuller, 7 Kan. 331.

*Louisiana*.—Conrey v. Brenham, 1 La. Ann. 397; Ingram v. Richardson, 2 La. Ann. 839; Taylor v. Sutton, 6 La. Ann. 709; Bartlett v. Wheeler, 31 La. Ann. 540.

*Maryland*.—Northern Cent. R. Co. v. Rider, 45 Md. 24.

*Minnesota*.—Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

*New Jersey*.—See Beebe v. George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

*West Virginia*.—Marling v. Robrecht, 13 W. Va. 440.

<sup>17</sup> *Edwards v. Moore*, 99 N. C. 1, 5 S. E. 13; *Adickes v. Lowry*, 12 S. C. 97.

<sup>18</sup> *Rice v. Bennett*, (S. D.) 137 N. W. 359.

<sup>19</sup> *Ingram v. Richardson*, 2 La. Ann. 839; *Multnomah Lumber Co. v. Western Basket Co.*, 54 Ore. 22, 99 Pac. 1046, *rehearing denied* 54 Ore. 28, 102 Pac. 1; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705; *McLamore v. Heffner*, 31 Tex. 189.

See also *Fisher v. Battaile*, 31 Miss. 471.

<sup>20</sup> *Clark v. Morrison*, 80 Ga. 393, 6 S. E. 171; *Unger v. Bitser*, 3 Lanc. L. Rev. (Pa.) 369. See also *supra*, §§ 211-214.

In *Fail v. Pressley*, 50 Ala. 342, it was held that an acknowledgment of service, made in the defendant's name by an attorney, would not be set aside at the instance of his personal representative, against whom the action had been revived on the defendant's death, the evidence showing that it was made in the defendant's presence, with his knowledge, and without objection from him, and that the attorney's name was regularly entered on the trial docket as attorney for the defendant for several consecutive terms before and up to the defendant's death.

*Long-continued Relationship*.—A party who has allowed an attorney to represent him in a suit for five years or more cannot, at the expiration of that length of time, object to the attorney's acceptance of the original process, the suit having been begun by attachment. *Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268.

upon his client. Such authority, however, should be specific,<sup>1</sup> and should appear in the acceptance of service.<sup>2</sup> It has also been held that where service of a writ was acknowledged by an attorney subject to his client's approval, under express authority, without fixing a time within which a revocation thereof might be made, such power could be exercised only within a reasonable time, to be determined by the circumstances involved, and, therefore, for obvious reasons, not after the term to which such writ was returnable.<sup>3</sup> A letter authorizing a person to acknowledge service of the declaration on behalf of a defendant invests him with no authority to waive process.<sup>4</sup> As a general rule, a litigant is bound by directions as to the service of the writ given by his attorney to the officer to whom the writ is delivered for service.<sup>5</sup>

<sup>1</sup> *England*.—*Bayley v. Buckland*, 1 Exch. 1.

*Kansas*.—*Atchison, etc., R. Co. v. Benton*, 42 Kan. 707, 22 Pac. 698.

*Minnesota*.—*Masterson v. Le Claire*, 4 Minn. 163.

*North Carolina*.—*Starr v. Hall*, 87 N. C. 381.

*Pennsylvania*.—*Lawrence v. Ruth-erford*, 1 Pearson 555; *McPherson v. McPherson*, 2 Leg. Chron. 342.

*South Carolina*.—*Reed v. Reed*, 19 S. C. 548.

In an action on foreign judgments, evidence held not to show that the attorney who waived issuance and service of process in the actions wherein such judgments were rendered was authorized to do so. *Rice v. Bennett*, (S. D.) 137 N. W. 359.

<sup>2</sup> See *Philadelphia v. Jacobs*, 22 W. N. C. (Pa.) 348.

See also *Segars v. Segars*, 76 Me. 96, wherein the court said, of the acceptance of service of a citation to an executor, "True, there is an acknowledgment of service upon the process, but no proof of its genuineness, and a judgment entered upon

such an acknowledgment would be open to all the defenses which might be raised to an action upon a simple contract. The acknowledgment is not by the party himself, but by an attorney who does not appear to have been an attorney of record, and therefore [there is] no proof of his authority, and if there were, the writing affords no proof of the 'due notice' to the executor which the law requires."

*Must Proce Attorney's Signature*.—In *Masterson v. Le Claire*, 4 Minn. 163, it was said that where service of the summons is admitted in writing indorsed on it, the signature of the defendants must be proved, or the proof of service is defective. The court will not take notice of the signature of an attorney of the court signed to such an admission, whether signed for himself, or for another.

<sup>3</sup> *Felder v. Johnson*, 1 Bailey L. (S. C.) 624.

<sup>4</sup> *Clark v. Morrison*, 85 Ga. 220, 11 S. E. 614.

<sup>5</sup> *Gray v. Patton*, 13 Bush (Ky.) 625; *Morgan v. Joyce*, 66 N. H. 538, 27 Atl. 225.

§ 254. Subsequent Notices and Other Papers. — When the original process has been served, the attorney retained in the cause may, as a general rule, acknowledge the services of all subsequent notices, or other papers, pertaining to the suit; and, should he refuse to do so, service may be made upon him as effectively as if his client were served in person;<sup>6</sup> and it has been so held as to the service of motions and orders.<sup>7</sup> It has also been

<sup>6</sup> *United States*.—*Buddicum v. Kirk*, 3 Cranch 293, 2 U. S. (L. ed.) 444; *Kamm v. Stark*, 1 Sawy. 547, 14 Fed. Cas. No. 7,604; *Segee v. Thomas*, 3 Blatchf. 11, 21 Fed. Cas. No. 12,633; *Bartlett v. Sultan of Turkey*, 19 Fed. 346; *Abraham v. North German F. Ins. Co.*, 37 Fed. 731, 3 L.R.A. 188; *Gasquet v. Fidelity Trust, etc., Co.*, 57 Fed. 80, 13 U. S. App. 564, 6 C. C. A. 253; *U. S. v. 59,650 Cigars*, 138 Fed. 166.

*California*.—*Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

*Massachusetts*.—*McKenna v. McArdle*, 191 Mass. 96, 77 N. E. 782.

*Missouri*.—*McDonough v. Daly*, 3 Mo. App. 606.

*New Hampshire*.—*Smith v. Hill*, 45 N. H. 403.

*New York*.—N. Y. Code Civ. Pro. §§ 60, 790-802. See also *Merritt v. Annan*, 7 Paige 151; *Driggs v. Van Loon*, 1 Col. Cas. 51, Col. & C. Cas. 56.

*Pennsylvania*.—*Nash v. Gilkeson*, 5 S. & R. 352; *Com. v. Schooley*, 5 Kulp 53.

*Wisconsin*.—*Harris v. Snyder*, 113 Wis. 451, 89 N. W. 660.

*Canada*.—*Arthur v. Nelson*, 6 British Columbia 316; *Muir v. Guinane*, 9 Ont. L. Rep. 324.

*Where Personal Service Impossible*.—In *Louisiana* citation of appeal should be made upon the appellee personally or at his domicile when he re-

sides in the state; but if after diligent search he cannot be found by the sheriff, and if he has no domicile at which to make a domiciliary service, citation served upon his attorney will save the appeal from absolute dismissal. *Levy v. Levy*, 107 La. 576, 32 So. 117.

<sup>7</sup> *United States*.—*Eureka Lake, etc., Canal Co. v. Superior Ct.*, 116 U. S. 410, 6 S. Ct. 429, 29 U. S. (L. ed.) 671.

*California*.—*Golden Gate, etc., Co. v. Superior Ct.*, 65 Cal. 192, 3 Pac. 628; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

*Illinois*.—*Manufacturers' Paper Co. v. Lindblom*, 80 Ill. App. 267; *Patterson v. Northern Trust Co.*, 132 Ill. App. 208, affirmed 230 Ill. 334, 82 N. E. 837, and 231 Ill. 22, 82 N. E. 840.

*Kansas*.—*Smith v. Cunningham*, 59 Kan. 552, 53 Pac. 760.

*New York*.—*Flynn v. Bailey*, 50 Barb. 73; *Lee v. Brown*, 6 Johns. 132; *Stafford v. Brown*, 4 Paige 360; *Walker v. Walker*, 20 Hun 400; *Drury v. Russell*, 27 How. Pr. 130; *Miller v. Miller*, 37 How. Pr. 1; *Pitt v. Davison*, 37 N. Y. 235, reversing 37 Barb. 97; *Mahon v. Mahon*, 50 Super Ct. 92.

*North Carolina*.—*Branch v. Walker*, 92 N. C. 87.

*Pennsylvania*.—*Hutcheson v. Johnson*, 1 Bin. 59.

held that a bill to enjoin the respondent from further prosecuting an action at law may properly be served upon the attorney who appears for the respondent in the action at law.<sup>8</sup> In some states service upon attorneys is provided for by statute.<sup>9</sup> The notice, motion, order, rule, or other paper, should, in all cases, be served on the attorney of record,<sup>10</sup> although he may be the attorney for the nominal plaintiff only, and not for the real plaintiff.<sup>11</sup> The word "attorney," as used in the statutes regarding service of papers, refers to attorneys at law, and does not include "attorneys in fact."<sup>12</sup> When there are several joint parties, and each appears by his own attorney, the attorney for one of such parties cannot give notice of motion, or accept service of notice, or stipulate, for another;<sup>13</sup> but where all of several joint parties are represented by the same attorney, service upon such attorney is sufficient although some of such parties are represented by other counsel.<sup>14</sup> So where a firm has entered an appearance, service may be made on either of the

<sup>8</sup> *Chalmers v. Hack*, 19 Me. 124; *Marco v. Low*, 55 Me. 549. See also *Eckert v. Bauert*, 4 Wash. 370, 8 Fed. Cas. No. 4,206; *Ward v. Seabry*, 4 Wash. 428, 29 Fed. Cas. No. 17,161; *Ward v. Seabring*, 4 Wash. 472, 29 Fed. Cas. No. 17,160.

But see *Death v. Pittsburg Bank*, 1 Ia. 382, holding that, under the Iowa statute, service upon the attorney was not such service on the party as to give the court jurisdiction to order a perpetual injunction.

<sup>9</sup> *Nelson v. Omaley*, 6 Greenl. (Me.) 218; *Mercier v. Pearlstone*, 7 Abb. Pr. (N. Y.) 325.

*Pennsylvania—Venditioni Exponas.*—Under Act Pa., Jan. 24, 1849, a notice to a life tenant of an application for a writ of *venditioni exponas* to sell his life estate may be served on his attorney of record in the suit. *Goodell v. Ehresman*, 11 Pa. Co. Ct. 400.

<sup>10</sup> *Gregory v. Pike*, 79 Fed. 520, 50 U. S. App. 4, 25 C. C. A. 48; *Grant*

*v. White*, 6 Cal. 55; *Powers v. Braly*, 75 Cal. 237, 17 Pac. 197. See also *Roussin v. Stewart*, 33 Cal. 208. See also *McNairy v. Castleberry*, 6 Tex. 286.

Compare *Fisher v. Battaile*, 31 Miss. 471, holding that service on the attorney who conducts and manages the case is sufficient, although he is not the attorney of record.

<sup>11</sup> *Simington v. Kent*, 8 Ala. 691.

<sup>12</sup> *Drake v. Duvenick*, 45 Cal. 455; *Ingram v. Richardson*, 2 La. Ann. 839; *Weir v. Slocum*, 3 How. Pr. (N. Y.) 397. But see *Fisher v. Battaile*, 31 Miss. 471.

<sup>13</sup> *Hobbs v. Duff*, 43 Cal. 485.

<sup>14</sup> *Landyskowski v. Lark*, 108 Mich. 500, 66 N. W. 371; *Walsh v. Mueller*, 14 Mont. 76, 35 Pac. 226.

Where a solicitor appeared at different times for different defendants in the cause, a copy of the bill should be served on each appearance. *People v. Boyd*, 2 Edw. (N. Y.) 516.

partners;<sup>15</sup> but a former partner of the attorney of record cannot act for him after the firm has been dissolved;<sup>16</sup> and if the counsel of record be deceased, service cannot be made either on his former partner or his personal representative.<sup>17</sup> An acceptance of service in ignorance of the fact that the client was not properly served with the original process, may be disregarded.<sup>18</sup>

**§ 255. Manner of Service.** — In the absence of special regulation, service upon an attorney should be made in precisely the same manner as if it were made on his client; but where the mode of service on attorneys is fixed by statute or rule of court, the service must, of course, conform thereto.<sup>19</sup> Under statutes prevailing in some jurisdictions service on the attorney's clerk,<sup>20</sup> or other person in charge of his office,<sup>1</sup> is sufficient, especially where he is

<sup>15</sup> *Lansing v. McKillup*, 7 Cow. (N. Y.) 416.

As to partnerships generally, see *supra*, §§ 183-185.

<sup>16</sup> In *Diefendorf v. House*, 9 How. Pr. (N. Y.) 243, it was said that where the attorney of record dissolved his partnership and left the state, but did not become a nonresident, service must still be made on him and not on his former partner. Service on a nonresident, however, would be irregular.

<sup>17</sup> *Bacon v. Hart*, 1 Black 38, 17 U. S. (L. ed.) 52.

*Notice to Attorney's Administrator.*—Where, ten years after the death of an attorney, notice of a motion was given to his administrator, it was held to be insufficient. *Waddle v. Dayton*, 8 N. J. L. 174.

<sup>18</sup> *Rodgers v. Mutual Endowment Assessment Assoc.*, 17 S. C. 409.

<sup>19</sup> *Nathan v. Sutphen*, 68 Cal. 267, 9 Pac. 110; *Cleland v. Clark*, 111 Mich. 336, 69 N. W. 652; *Mayell v. Sprague*, 8 Cow. (N. Y.) 116.

*New York—Agents of Solicitors.*—

As to the former New York practice concerning the appointment of agents for solicitors upon whom notice might be served, see *Hausenfrats v. Graves*, Col. & C. Cas. 101; *Russell v. Ball*, 1 Caines 252; *Hunt v. Onderdonk*, 3 Johns. 149; *Backus v. Rogers*, 8 Johns. 346; *Chapman v. Raymond*, 8 Johns. 360; *Caines v. Gardner*, 11 Johns. 89; *Jackson v. Stiles*, 11 Johns. 195; *Brown v. Childs*, 17 Johns. 1; *Lawrence v. Warner*, 1 Cow. 198; *Lockwood v. McLean*, 18 Wend. 656; *Champlin v. Fonda*, 4 Johns. Ch. 62; *Billings v. Rattoon*, 5 Johns. Ch. 189; *James v. Berry*, 1 Paige 47; *Sinclair v. Sandford*, 7 Paige 432; *Waffie v. Vanderheyden*, 8 Paige 45; *Freeland v. Nott*, 8 Paige 431; *Johnson v. Quackenbush*, 1 Barb. Ch. 292.

<sup>20</sup> *Page v. Superior Court*, 122 Cal. 209, 54 Pac. 730; N. Y. Code Civ. Pro. § 797 (2). See also *Power v. Kent*, 1 Cow. (N. Y.) 211.

<sup>1</sup> N. Y. Code Civ. Pro. § 797 (2). See also *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121.



absent therefrom;<sup>3</sup> but the fact that a clerk in an attorney's office is authorized to accept service of papers in cases in which the attorney has been retained professionally, will not authorize him to accept service in an action against the attorney.<sup>4</sup> Where a paper is served by leaving it with a person in the attorney's office, it must be shown that such person bears to the attorney the relation contemplated by the statute.<sup>4</sup> Statutory service at an attorney's office charges him with notice, notwithstanding he may not actually receive it until after he has taken further proceedings.<sup>5</sup> The affidavit of service (the return) should name the person upon whom service was made, and state the capacity in which he acted.<sup>6</sup> Service at the office should be made during office hours;<sup>7</sup> but where

<sup>3</sup> *Attorney Present in Adjacent Room.*—Where, at the time a copy of an order was served, the attorney did not appear to be in his office, and the person employed to make the service accordingly delivered the copy to the individual found in charge of the office, it was held that the fact that the attorney was at the time in an adjacent room and easily accessible did not render the service irregular, especially in view of the fact that the copy order soon came into his hands. *Gross v. Clark*, 1 Civ. Pro. (N. Y.) 17.

<sup>4</sup> *Lower v. Wilson*, 9 S. D. 252, 68 N. W. 545, 62 Am. St. Rep. 865.

<sup>5</sup> *Anonymous*, Col. & C. Cas. (N. Y.) 176; *Rathbone v. Blackford*, 1 Caines (N. Y.) 343; *Gelston v. Swartwout*, 1 Johns. Cas. (N. Y.) 136.

*Service on Attorney's Brother.*—In *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121, service on the attorney's brother, who happened to be in the office, was held sufficient.

*Where two attorneys had offices with a common entrance*, it was held that one of them had "charge of the office" of the other when present

therein, so as to justify service of papers upon him. *Crook v. Crook*, 14 Daly 298, 12 N. Y. St. Rep. 663.

*Person Having Desk Room in Office.*—In *Treftz v. Stahl*, 46 Ill. App. 462, 18 L.R.A. 500, it was held that service of notice of motion by leaving a copy with one who merely had desk room in an attorney's office was not sufficient. But it was further held that such attorney, having knowledge of the attempted service and suffering the case to be tried without objection, waived the irregularity.

<sup>6</sup> *Troy Carriage Works v. Muxlow*, 16 Misc. 561, 38 N. Y. S. 938.

<sup>7</sup> *Graham v. Powers*, 51 Hun 643 mem., 3 N. Y. S. 899.

<sup>8</sup> N. Y. Code Civ. Pro. § 797 (3). See also *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63.

In *Asinari v. Volkening*, 2 Abb. N. Cas. (N. Y.) 454, it was held that service of a paper by leaving it in the office of the plaintiff's attorney on the last day to answer, after the office was closed and all had left for the day, was not sufficient.

*Clerk about to Enter Office.*—Where, during the absence of the

an attorney or his clerk is present in the office, even at a late hour at night, service at such time is good.<sup>8</sup> Some statutes and court rules provide that where no one is in charge of the office, the paper may be served, during office hours, by leaving it in a conspicuous place in the office, or by depositing it in the office letter-box.<sup>9</sup> A service of this character is available only where it appears that no one authorized to receive the paper was present,<sup>10</sup> and that the office door was open or unlocked.<sup>11</sup> A paper cannot be properly served, under such a regulation, by throwing it through the transom,<sup>12</sup> or by pushing it under the door,<sup>13</sup> or dropping it through a slit in the door,<sup>14</sup> or by getting some one to unlock the door and leaving the paper in a conspicuous place;<sup>15</sup> but it seems that where leave to unlock the door and make service of a paper is granted by a person having authority to do so, the service is good.<sup>16</sup> It has also been held that depositing a paper through the door of the office in a letter-box, placed there for the reception of documents, is putting it in a conspicuous place within the meaning of such a statute.<sup>17</sup> In some instances it is provided that

complainant's solicitor from his office, an answer was served by delivering the same to the clerk at the door of the office as he was about to open and enter the office, and such clerk immediately afterwards opened and entered the office, and took the answer in with him, it was a good service. *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496.

<sup>8</sup> *Cooper v. Carr*, 8 Johns. (N. Y.) 360; *Miller v. Stocking*, 22 Wend. (N. Y.) 623.

<sup>9</sup> N. Y. Code Civ. Pro. § 707 (3). See also *Corn Exch. Bank v. Blye*, 44 Hun 628 mem., 9 N. Y. St. Rep. 67.

<sup>10</sup> *Jackson v. Gardner*, Col. & C. Cas. (N. Y.) 359.

<sup>11</sup> *Anonymous*, 18 Wend. (N. Y.) 578; *Haight v. Moore*, 36 Super. Ct. (N. Y.) 294.

<sup>12</sup> *Clafin v. Du Bois*, 13 Civ. Pro.

(N. Y.) 234; *Haight v. Moore*, 36 Super. Ct. (N. Y.) 294.

<sup>13</sup> *Haight v. Moore*, 36 Super. Ct. (N. Y.) 294; *Corning v. Pray*, 2 Wend. (N. Y.) 626; *Anonymous*, 18 Wend. (N. Y.) 578. Compare *Anonymous*, Col. & C. Cas. (N. Y.) 426.

<sup>14</sup> *Livingston v. New York El. R. Co.*, 58 Hun 131, 19 Civ. Pro. 258, 11 N. Y. S. 359; *Timolat v. S. J. Held Co.*, 15 Misc. 630, 37 N. Y. S. 221.

<sup>15</sup> *Vail v. Lane*, 4 Hun (N. Y.) 653; *Haight v. Moore*, 36 Super. Ct. (N. Y.) 294; *Campbell v. Spencer*, 1 How. Pr. (N. Y.) 199; *Livingston v. McIntyre*, 1 How. Pr. (N. Y.) 253.

<sup>16</sup> *Livingston v. McIntyre*, 1 How. Prac. (N. Y.) 253.

<sup>17</sup> *January v. Superior Ct.*, 73 Cal. 537, 15 Pac. 108; *Duval v. Busch*, 21 Abb. N. Cas. (N. Y.) 214, 13 N. Y. St. Rep. 752.

where the attorney's office is closed, and there is no letter-box, the paper may be served by leaving it at the attorney's residence within the state with a person of suitable age and discretion.<sup>18</sup> Service by mail is authorized in some states;<sup>19</sup> thus a notice to a non-resident attorney, who appears of record as the attorney in charge of the cause, unassociated with local counsel, is sufficient if made by means of the employment of the registered mail service;<sup>20</sup> but an attorney is not bound to take a letter from the post office charged with postage, though he has reason to believe it contains legal

<sup>18</sup> N. Y. Code Civ. Pro. § 797 (3). See also *Lathrop v. Judivini*, 2 Cow. (N. Y.) 484; *Gelston v. Swartwout*, 1 Johns. Cas. (N. Y.) 136; *Salter v. Bridgen*, 1 Johns. Cas. (N. Y.) 244; *Campbell v. Smith*, 9 Wis. 305.

<sup>19</sup> Under the New York code service may be made "upon a party or an attorney, through the post office, by depositing the paper, properly inclosed in a postpaid wrapper, in the post office, or in any post-office box regularly maintained by the government of the United States and under the care of the post office, of the party, or the attorney serving it. directed to the person to be served at the address, within the state, designated by him for that purpose, upon the preceding papers in the action; or, where he has not made such a designation, at his place of residence, or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same." N. Y. Code Civ. Pro. § 797 (1).

"In the city of New York, where a paper is served or a return is made through the post office, the deposit of the package in a branch post office has the same effect, as a deposit in the general or principal post office

of that city." N. Y. Code Civ. Pro. § 801.

<sup>20</sup> *Bonney v. McClelland*, 138 Ill. App. 449, affirmed 235 Ill. 259, 85 N. E. 242.

Under the New York Code of Civil Procedure, "service of a paper, which might be made upon him at his residence, if he was resident of the state, may be made upon a person regularly admitted to practice as an attorney and counselor, in the courts of record of this state, whose office for the transaction of law business is within the state, but who resides in an adjoining state, by depositing the paper in a post office in the city or town where his office is located, properly inclosed in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him." N. Y. Code Civ. Pro. § 60.

Where a party to an action, who has appeared in person, resides without the state, or his residence cannot, with reasonable diligence, be ascertained, and he has not designated an address, within the state, upon the preceding papers, service of a paper upon him may be made, by serving it on the clerk. N. Y. Code Civ. Pro. § 800.

papers.<sup>1</sup> An irregular service at an attorney's office may be waived by him.<sup>2</sup> Thus it has been held that where the attorney upon whom a paper is served objects to the sufficiency thereof, he should return the same immediately,<sup>3</sup> and state the ground of his objection.<sup>4</sup> Retaining and acting on a paper improperly served is deemed a waiver of the objection,<sup>5</sup> excepting where the original has been filed.<sup>6</sup> But neglecting to return a notice improperly served on the party, instead of on his attorney, will not estop the party from objecting that the service was not made in the manner prescribed by the statute.<sup>7</sup> The failure to return a pleading

<sup>1</sup> Anonymous, 19 Wend. (N. Y.) 87.

<sup>2</sup> Treftz v. Stahl, 46 Ill. App. 462, 18 L.R.A. 500.

<sup>3</sup> Wright v. Forbes, 1 How. Pr. (N. Y.) 240, wherein it was held that a delay of two months was too long; Stillman v. Whitney, 1 How. Pr. (N. Y.) 243, holding that a delay of a week was too long. In McGown v. Leavenworth, 2 E. D. Smith (N. Y.) 24, it was held that a paper returned within twenty-four hours after its receipt was returned within a "reasonable time."

*Second Return Not Necessary.*—After the plaintiff's attorney has once returned an answer because of the expiration of the time to answer, if it is again served him he is not bound to return it a second time. Jacobs v. Marshall, 6 Duer (N. Y.) 689.

So, where an attorney promptly returned a notice of appeal served too late, with an indorsement thereon of the reason for its return, it was held that an omission thereafter to return the printed case subsequently served was not a waiver of the objection, if its printing or service was not induced by any act of his. Marsh v.

Pierce, 110 N. Y. 639, 17 N. E. 729.

*Where No Attorney's Name on Papers.*—Papers returned on account of irregularity, which have no attorney's name on them, should be returned to the party himself; or if the party is a municipal corporation, having a counsel under statute, they should be returned to such counsel. Taylor v. New York, 11 Abb. Pr. (N. Y.) 255.

<sup>4</sup> Chemung Canal Bank v. Judson, 10 How. Pr. (N. Y.) 133; White v. Cummings, 3 Sandf. (N. Y.) 716. See also Ehle v. Haller, 6 Bosw. (N. Y.) 661.

<sup>5</sup> Wright v. Forbes, 1 How. Pr. (N. Y.) 240; Travis v. Hill, 2 How. Pr. (N. Y.) 246; Georgia Lumber Co. v. Strong, 3 How. Pr. (N. Y.) 246; McGown v. Leavenworth, 2 E. D. Smith (N. Y.) 24. See also Rogers v. Rockwood, 20 Civ. Pro. 212, 13 N. Y. S. 939; Meislahn v. Hanken, 18 N. Y. S. 361.

<sup>6</sup> A party always has the right to move to set aside a paper improperly put on file. Davis v. Fitzmanville, 3 How. Pr. (N. Y.) 108.

<sup>7</sup> Purvis v. Gray, 39 How. Pr. (N. Y.) 1.

does not, of course, preclude a defense as to the allegations contained therein.<sup>8</sup>

**§ 256. Notice and Demand.** — A duly authorized attorney, after employment, may give any notice, or make any demand, affecting the substantial rights of his client, that the client might himself have given or made, and those intended to be affected by such notice or demand must take cognizance thereof,<sup>9</sup> even though a notice so given is material to the maintenance of a suit.<sup>10</sup> Thus notice to the general counsel of a corporation respecting a matter in which he is authorized to act for it, is notice to the corporation.<sup>11</sup> Those who dispute the authority of an attorney to give such notices must prove their contention,<sup>12</sup> for a court of record will presume that an attorney is acting, in all matters affecting his client's rights, with authority from the client.<sup>13</sup> But it has been held that the authority to notify an adverse party that his agency for another is terminated is not, at least before the commencement of an action, among the express or implied powers of an attorney.<sup>14</sup> A statutory provision to the effect that all notices shall be served upon the attorney, and not upon the party, has reference more particularly to notices of motions, and other pro-

<sup>8</sup> *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688, *reversing* 39 Hun 88.

<sup>9</sup> *Alabama*.—*Spence v. Rutledge*, 11 Ala. 557.

*California*.—*Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

*Illinois*.—*Champion Iron Fence Co. v. Wernsing*, 19 Ill. App. 42.

*Massachusetts*.—*Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197; *Pettis v. Kellogg*, 7 Cush. 456.

*Michigan*.—See *Cady v. Fair Plain Literary Assoc.*, 135 Mich. 295, 97 N. W. 680, 10 Detroit Leg. N. 725.

*New Hampshire*.—*Stevens v. Reed*, 37 N. H. 49.

*New York*.—*Vogemann v. American Dock, etc., Co.*, 131 App. Div. 216, 115 N. Y. S. 741, *affirmed* 198 N. Y. 586, 92 N. E. 1105.

*Oklahoma*.—*Nolan v. St. Louis & S. F. R. R. Co.*, 19 Okla. 51, 91 Pac. 1128.

*Wisconsin*.—*Elwell v. Prescott*, 38 Wis. 274.

<sup>10</sup> *Nolan v. St. Louis, etc., R. Co.*, 19 Okla. 51, 91 Pac. 1128.

<sup>11</sup> *Vogemann v. American Dock & Trust Co.*, 131 App. Div. 216, 115 N. Y. S. 741.

<sup>12</sup> *Nolan v. St. Louis, etc., R. Co.*, 19 Okla. 51, 91 Pac. 1128.

<sup>13</sup> *Nolan v. St. Louis, etc., R. Co.*, 19 Okla. 51, 91 Pac. 1128.

As to the presumption of authority generally, see *supra*, § 230.

<sup>14</sup> *Tingley v. Parshall*, 11 Neb. 443, 9 N. W. 571.

ceedings, served during the pendency of an action, and does not exclude the right of a plaintiff personally to serve a notice of the dismissal of his action upon the defendant, instead of on the defendant's attorney.<sup>15</sup>

**§ 257. Professional Relationship Must Exist.** — As a general rule, service upon an attorney, or the acceptance of service by him, is effective only where the relation of attorney and client exists;<sup>16</sup> thus in those jurisdictions wherein it is held that the entry of a final judgment terminates the relation, and there is no evidence indicating a continuation thereof, the service of subsequent notices on the attorney is ineffectual.<sup>17</sup> The common-law rule that notice to an attorney of record is notice to his client, applies only to notices arising in the progress of a cause, or to other matters as to which the relation of attorney and client exists when notice is given.<sup>18</sup> But service upon one who appears as attorney of record is valid although the client may have discharged him and employed a new one, in the absence of notice of such change to the adverse party or his attorney.<sup>19</sup>

### *Admissions and Stipulations.*

**§ 258. Admissions.** — The implied power of an attorney to make an admission of fact on behalf of his client, within the apparent scope of his authority in conducting litigation, is beyond question.<sup>20</sup> Admissions when so made by the attorney bind the

<sup>15</sup> *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 137 Am. St. Rep. 549, 31 L.R.A.(N.S.) 523.

<sup>16</sup> As to the creation and termination of the relation of attorney and client, see *supra*, §§ 133-142.

<sup>17</sup> *Konta v. St. Louis Stock Exch.*, 150 Mo. App. 617, 131 S. W. 380.

<sup>18</sup> *Konta v. St. Louis Stock Exch.*, 150 Mo. App. 617, 131 S. W. 380.

<sup>19</sup> *Grant v. White*, 6 Cal. 55; *Landyskowski v. Lark*, 108 Mich. 500, 66 N. W. 371; *Wood v. Holmes*, 19 N. Y. Wkly. Dig. 121; *De Vall v. De*

*Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

See also *supra*, § 149.

Compare *Beck v. Avondino*, 20 Tex. Civ. App. 330, 50 S. W. 207, wherein it was held that notice of motion to the attorneys of record in a suit, who had ceased to represent their clients therein some years prior thereto, the suit having been off the docket for six years, and they declining to accept it, stating that they no longer represented defendants, is insufficient.

<sup>20</sup> *Harniska v. Dolph*, 133 Fed. 158,

client,<sup>1</sup> and dispense with the necessity of proof.<sup>2</sup> In the absence of accident, mistake, or fraud, both the client and his attor-

66 C. C. A. 224; *James v. Boston Elevated R. Co.*, 201 Mass. 263, 87 N. E. 474; *Bingham v. Winona County*, 6 Minn. 136; *People v. Mole*, 85 App. Div. 33, 82 N. Y. S. 747; *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun 365, 22 N. Y. S. 348.

*Admission on Trial of Capital Offense.*—It is true that in the trial of capital offenses the court will and should exercise care and discretion in respect to admissions made by the accused or by his counsel in open court, and that every conviction should be supported by some evidence produced in court, and so even a plea of guilty will not ordinarily be accepted. But it is not true that an accused cannot, either by himself or his counsel, in his own interest, admit some facts which, though necessary for the state to establish, may be consistent with his innocence, and the defense he maintains. Subject to the reasonable discretion of the court in the protection of the accused against improvidence or mistake, admissions during the trial by the accused or his counsel as to the genuineness of a document; admissions as to the testimony a witness not produced would give if present, or the fact his testimony would establish, voluntarily made for the purpose of preventing a postponement of the trial; and admissions in the interest of the accused limiting the issue to the material facts upon which alone his successful defense depends, have long been permitted under our practice, and we think their lawfulness and propriety rest

upon sound reason. *State v. Marx*, 78 Conn. 18, 60 Atl. 690.

Admissions by attorney as evidence, see *supra*, §§ 193-198.

<sup>1</sup> *Illinois*.—*Wilson v. Spring*, 64 Ill. 14.

*Indian Territory*.—*Dorrance v. McAlester*, 1 Ind. Ter. 473, 45 S. W. 141.

*Kansas*.—*Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

*Kentucky*.—*Talbot v. McGee*, 4 T. B. Mon. 375.

*Massachusetts*.—*Lewis v. Sumner*, 13 Metc. 269.

*Mississippi*.—*Wemans v. Lindsey*, 1 How. 577.

*New York*.—*Oliver v. Bennett*, 65 N. Y. 559; *People v. Westchester County*, 60 Hun 585 mem., 15 N. Y. S. 580.

*North Carolina*.—*Brooks v. Brooks*, 90 N. C. 142; *J. L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 137 N. C. 431, 49 S. E. 946, *modifying* 135 N. C. 744, 47 S. E. 757.

*Oregon*.—*Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

<sup>2</sup> *Illinois*.—*Preston v. Davis*, 112 Ill. App. 636; *Fidelity & Casualty Co. v. Morrison*, 129 Ill. App. 360; *Tananevich v. Lamezyk*, 134 Ill. App. 135; *Todd v. Daniels*, 153 Ill. App. 223.

*Massachusetts*.—*Westheimer v. State Loan Co.*, 195 Mass. 510, 81 N. E. 289.

*Missouri*.—*Everett v. Marston*, 186 Mo. 587, 85 S. W. 540.

*New Jersey*.—*Patterson v. Read*, 43 N. J. Eq. 18, 10 Atl. 807.

ney are estopped to deny them,<sup>3</sup> especially where they have been acted upon.<sup>4</sup> Admissions beyond the apparent scope of an attorney's authority do not, of course, bind the client,<sup>5</sup> nor can the rights of clients be divested by the loose, unauthorized expressions of an attorney.<sup>6</sup> Admissions made for the purpose of one trial are not binding in a subsequent trial of the same cause;<sup>7</sup> so, an attorney for two plaintiffs in separate suits has no right to make a statement in one which will bind his client in the other.<sup>8</sup> So, also, a client will not be affected by an erroneous admission of what the law is on a given statement of fact.<sup>9</sup> Admissions as evidence have been heretofore considered.<sup>10</sup>

**§ 259. Stipulations Generally.**—The power of an attorney over the conduct of a cause which he has been retained to conduct

*South Carolina.*—*Daniel v. Ray*, 1 Hill L. 32.

*Matters of Public Interest.*—Admissions by counsel will not relieve the court from considering grave questions involving the public interest. *State v. Parkinson*, 5 Nev. 15.

<sup>3</sup> *Bochat v. Knisely*, 144 Ill. App. 551; *Patterson v. Read*, 43 N. J. Eq. 18, 10 Atl. 807; *Bollmann v. Bollmann*, 6 S. C. 29; *Cooke v. Pennington*, 7 S. C. 385.

<sup>4</sup> *Ives v. Ives*, 80 Hun 136, 29 N. Y. S. 1053, *modifying* 7 Misc. 328, 28 N. Y. S. 170; *Ex p. Jones*, 47 S. C. 393, 25 S. E. 285.

<sup>5</sup> *Solomon R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Lytle v. Crawford*, 89 App. Div. 273, 32 Civ. Proc. 360, 74 N. Y. S. 660; *Asheville Supply & Foundry Co. v. Machin*, 150 N. C. 738, 64 S. E. 887; *Mathews v. Massey*, 4 Baxt. (Tenn.) 450, *following* *Holker v. Parker*, 7 Cranch 436, 3 U. S. (L. ed.) 396.

It is not within the province or authority of the attorney at law em-

ployed by the depository to defend an action brought by the depositor for the destruction of the deposit, to make *in pais* admissions or statements in respect to the circumstances under which the destruction occurred. *Wilson v. Southern Pac. R. Co.*, 53 Cal. 735.

<sup>6</sup> *Harvin v. Blackman*, 108 La. 426, 32 So. 452; *Sullivan v. Dunham*, 35 App. Div. 342, 54 N. Y. S. 962; *McGarry v. McGarry*, 9 Pa. Super. Ct., 71, 29 Pittsb. Leg. J. N. S. 236, 43 W. N. C. 268; *Steele v. Jennings*, 1 McM. L. (S. C.) 297.

<sup>7</sup> *Daneri v. Gazzola*, 2 Cal. App. 351, 83 Pac. 455. See also *State v. Buchanan*, *Wright* (Ohio) 233. And see *supra*, § 198.

<sup>8</sup> *State v. Easterling*, 1 Rich. L. (S. C.) 310. See also *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155.

<sup>9</sup> *Mitchell v. Cotten*, 3 Fla. 134. See also *Harvin v. Blackman*, 108 La. 426, 32 So. 452.

<sup>10</sup> See *supra*, §§ 193-198.



is co-extensive with that of his client.<sup>11</sup> He has implied authority to bind his client in all matters which relate to the prosecution or defense of his rights, and, therefore, to make all such lawful agreements as he may deem necessary to lead to or secure the object of his employment, and settle by agreement or waiver any and all questions which incidentally arise during the progress of the trial. In many jurisdictions this rule has been made statutory.<sup>12</sup> Such agreements are binding on the parties,<sup>13</sup> even though the attorney fails to observe his client's instructions,<sup>14</sup> and will not be set aside except for fraud, collusion, accident, surprise, or some ground of this nature.<sup>15</sup> Justice requires that agreements fairly made between attorneys or parties in the progress of a cause, relating to the conduct of the suit, should be fairly and faithfully enforced, not because they are technically contracts and legally binding upon the parties, but because the administration of justice is thereby facilitated.<sup>16</sup> An agreement to waive an irregularity, to postpone or delay a trial, to take short notice of argument, to permit a cause to be brought to hearing summarily, and similar arrange-

<sup>11</sup> *Kent v. Ricards*, 3 Md. Ch. 392. And see *supra*, § 246 et seq.

<sup>12</sup> *Senn v. Joseph*, 106 Ala. 454, 17 So. 543; *Wadsworth v. First Nat. Bank*, 124 Ala. 440, 27 So. 460.

<sup>13</sup> *Alabama*.—*B. F. Roden Grocery Co. v. McAfee*, 160 Ala. 564, 49 So. 402.

*California*.—*Hart v. Spalding*, 1 Cal. 213; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Teich v. San Jose Safe Deposit Bank of Savings*, 8 Cal. App. 307, 97 Pac. 167.

*Illinois*.—*Elgin, etc., R. Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577.

*Indiana*.—*Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713.

*Maryland*.—*Lyon v. Hires*, 91 Md. 411, 46 Atl. 985.

*Missouri*.—*Letcher v. Letcher*, 50 Mo. 137; *Pratt v. Conway*, 148 Mo.

291, 49 S. W. 1028, 71 Am. St. Rep. 602.

*New York*.—*Wilcox v. Woodhall*, 2 Caines 250; *Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Mark v. Buffalo*, 87 N. Y. 184.

*North Carolina*.—*Pierce v. Perkins*, 17 N. C. 250.

*Texas*.—*Ward v. Wilson*, 17 Tex. Civ. App. 28, 43 S. W. 833, *affirmed* 92 Tex. 22, 45 S. W. 8.

<sup>14</sup> *Harrill v. Southern R. Co.*, 144 N. C. 542, 57 S. E. 382.

<sup>15</sup> *Ex p. Hayes*, 92 Ala. 120, 9 So. 156; *Wadsworth v. First Nat. Bank*, 124 Ala. 440, 27 So. 460; *Palliser v. Home Telephone Co.*, 170 Ala. 341, 54 So. 499; *Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609, 7 Detroit Leg. N. 367.

<sup>16</sup> *Howe v. Lawrence*, 22 N. J. L. 99.

ments, do not partake of the essence of legal contracts. They are founded upon no consideration, require no mutuality, and, if violated, no action lies for their breach. The court may refuse to enforce them unless they are reduced to writing and filed, or they may enforce them, in whole or in part, at their discretion. In short, they are regarded as a part of the machinery for the conduct of the cause entirely under the control of the court, and they will be enforced, or not, as the substantial rights of the parties and the ends of justice may require.<sup>17</sup> Stipulations may be agreed upon by attorneys for municipal or *quasi*-municipal bodies as well as for individual clients,<sup>18</sup> and before as well as after the institution of suit.<sup>19</sup> So, it has been held that counsel may enter into stipulations relative to the conduct of litigation in courts not of record.<sup>20</sup> Stipulations beyond the scope of the attorney's general authority, however, are not binding, excepting where he is specially authorized to enter into them.<sup>1</sup> In no case can an attorney stipulate for one who is not his client; and, as a general rule, a stipulation entered into by attorneys other than those who appear of record for the parties, will be disregarded;<sup>2</sup> but the termination of the professional relation does not vitiate a stipulation previously entered

<sup>17</sup> *Howe v. Lawrence*, 22 N. J. L. 99.

<sup>18</sup> *Lockwood v. Blackhawk County*, 34 Iowa 235 (county solicitors may stipulate); *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624 (counsel for municipality may make admission for the corporation).

<sup>19</sup> *Hefferman v. Burt*, 7 Iowa 320, 71 Am. Dec. 445.

But see *infra*, § 272.

<sup>20</sup> *Suspension Bridge v. Bedford*, 46 Hun 675, 10 N. Y. St. Rep. 850.

<sup>1</sup> *Illinois*.—*Wabash, St. L. & P. R. Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L.R.A. 207; *Chicago Gen. R. Co. v. Murray*, 174 Ill. 250, 51 N. E. 245; *Du Pont v. Chicago Sanitary Dist.*, 203 Ill. 170, 67 N. E. 815.

*Kentucky*.—*National Bank of Commerce v. Bowman*, 100 S. W. 831, 30 Ky. L. Rep. 1236.

*Louisiana*.—*Poussin's Succession*, 27 La. Ann. 296.

*Missouri*.—*Linck v. Linck*, 214 Mo. 464, 113 S. W. 1096.

*New York*.—*Babcock v. Arkenburg*, 42 Hun 660 mem., 4 N. Y. St. Rep. 467.

*Pennsylvania*.—*Luzerne Bldg. & Sav. Assoc. v. People's Sav. Bank*, 142 Pa. St. 121, 21 Atl. 806.

*Tennessee*.—*Rice v. Hunt*, 12 Call 498.

*Virginia*.—*Herbert v. Alexander*, 2 Heisk. 344.

<sup>2</sup> *Illinois*.—*Windmiller v. Chapman*, 38 Ill. App. 276.

*Iowa*.—*Beeman v. Kitzman*, 124 Iowa 86, 99 N. W. 171.

into by the attorney within the scope of his authority.<sup>3</sup> The authority of an attorney to make or alter contracts for his client generally has been considered heretofore.<sup>4</sup> Specific instances of stipulation, and agreements in the nature thereof, are considered throughout this chapter.<sup>5</sup>

**§ 260. In Matters of Procedure.**—In considering an attorney's authority in conducting litigation generally, reference has been made to the exclusiveness of his control in matters of procedure.<sup>6</sup> It merely remains to be stated here that, by virtue of this control, an attorney's stipulations as to such matters are binding upon his client; thus he may agree to the amendment of pleadings,<sup>7</sup> or to an extension of the time for the service,<sup>8</sup> or filing thereof.<sup>9</sup> So he can agree that a defendant may withdraw his answer and file a demurrer on condition that, in case the demurrer is overruled, final judgment shall be entered thereon.<sup>10</sup> An attorney may also stipulate that notice of appeal may be given and a statement of facts settled after the expiration of the time limited by law,<sup>11</sup> or that an appeal has in fact been taken and perfected, and that all the evidence has been certified to, and made a part of the record by the trial judge,<sup>12</sup> or for the affirmance of an order of the court

*Missouri.*—*Zahm v. Royal Fraternal Union*, 154 Mo. App. 70, 133 S. W. 374.

*New York.*—*Baron v. Cohen*, 62 How. Pr. 367.

*North Carolina.*—*Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130.

*An attorney of a trustee*, by virtue of his employment to prosecute a certain action, has no authority to waive the rights of the trust estate. Except in the manner of conducting the litigation, he has no authority to prejudice the rights of the trustee or the *cestui que trust*. *Spaulding v. Allen*, 10 Ohio Cir. Dec. 397, 19 Ohio Cir. Ct. 608.

<sup>3</sup> *Calmes v. Stone*, 7 La. Ann. 133.

<sup>4</sup> See *supra*, § 202.

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<sup>5</sup> See the analysis preceding § 246.

<sup>6</sup> See *supra*, § 249.

<sup>7</sup> *Brown v. Spiegel*, 156 Mich. 138, 120 N. W. 579, 16 Detroit Leg. N. 43; *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

<sup>8</sup> *Ducker v. Rapp*, 67 N. Y. 464, *reversing* 41 Super. Ct. 235; *Morris v. Press Pub. Co.*, 98 App. Div. 143, 15 N. Y. Ann. Cas. 343, 90 N. Y. S. 673.

<sup>9</sup> *Tevis v. Palatine Ins. Co.*, 149 Fed. 560; *Brooks v. Cavanaugh*, 11 La. Ann. 183. See also *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809.

<sup>10</sup> *Franklin v. National Ins. Co.*, 43 Mo. 401.

<sup>11</sup> *Haas v. Gaddis*, 1 Wash. 89, 23 Pac. 1010.

<sup>12</sup> *American Emigrant Co. v. Long*, 105 Iowa 194, 74 N. W. 940.

below,<sup>13</sup> or to extend the time within which a judge must decide a case which has been submitted to him.<sup>14</sup> He may also stipulate that an action shall not abate by the death of the plaintiff,<sup>15</sup> or to revive a cause which has abated,<sup>16</sup> or that an adjournment of the hearing of a motion shall not prejudice defendant's rights, although plaintiff died before the motion was heard,<sup>17</sup> or for the dissolution of an attachment.<sup>18</sup> So, he may waive service of process<sup>19</sup> and pleadings,<sup>20</sup> the right to file answer,<sup>1</sup> inquisition,<sup>2</sup> technical advantages,<sup>3</sup> informalities and irregularities,<sup>4</sup> and objections to the notice, and service of notice, and the form of the plaintiff's writ.<sup>5</sup> But a stipulation cannot be effective as against imperative statutory provisions.<sup>6</sup> Nor, generally, can a party stipulate in his own behalf where he is represented by counsel.<sup>7</sup>

**§ 261. As to Matters of Evidence.** — Counsel may also stipulate for the introduction of competent evidence so as to expedite the trial or other proceeding in the cause;<sup>8</sup> thus they may agree that letters may be received in evidence without calling the persons by or to whom they were written as witnesses, or otherwise proving the handwriting,<sup>9</sup> or that a deposition taken in advance of trial may, in the event of the death of one of the parties, be read on the

<sup>13</sup> *In re Skelly's Estate*, 21 S. D. 424, 113 N. W. 91.

<sup>14</sup> *Litt v. Stewart*, 62 N. Y. S. 1114.

<sup>15</sup> *Cox v. New York*, Cent. & H. R. R. Co., 63 N. Y. 414, reversing 6 Thomp. & C. 405.

<sup>16</sup> *Clark v. Parish*, 1 Bibb (Ky.) 547.

<sup>17</sup> *Hunt v. Hunt*, 154 App. Div. 833, 139 N. Y. S. 413.

<sup>18</sup> *Brown v. Spiegel*, 156 Mich. 138, 120 N. W. 579, 16 Detroit Leg. N. 43.

<sup>19</sup> *Patterson v. Read*, 43 N. J. Eq. 18, 10 Atl. 807.

<sup>20</sup> *People v. Boyd*, 2 Edw. (N. Y.) 516. See *supra*, § 253 et seq.

<sup>1</sup> *Patterson v. Read*, 43 N. J. Eq. 18, 10 Atl. 807.

<sup>2</sup> *Kissick v. Hunter*, 184 Pa. St. 174, 39 Atl. 83, 41 W. N. C. 377.

<sup>3</sup> *Gorham v. Gale*, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

<sup>4</sup> *Hanson v. Hoitt*, 14 N. H. 56. See also *State v. Tuller*, 34 Conn. 280.

<sup>5</sup> *Alton v. Gilmanton*, 2 N. H. 520.

<sup>6</sup> *Ex p. Dennis*, 48 Ala. 304. See also *State v. Gratiot*, 17 Wis. 245.

<sup>7</sup> *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264; *Bonnifield v. Thorp*, 71 Fed. 924; *Earhart v. U. S.*, 30 Ct. Cl. 343; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 809; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *McConnell v. Brown*, 40 Ind. 384. See also *supra*, §§ 248, 249.

<sup>8</sup> *Holmes v. State*, 82 Neb. 406, 118 N. W. 99.

<sup>9</sup> *Holmes v. State*, 82 Neb. 406, 118 N. W. 99.

trial of another action.<sup>10</sup> So counsel may, by stipulation, waive certain objections to the introduction of evidence.<sup>11</sup>

**§ 262. That One Suit Shall Abide Decision of Another.** — Where two cases involve the same questions of law and fact<sup>12</sup> an attorney may bind his client by a stipulation that the trial of one shall determine the issues in the other,<sup>13</sup> unless it has been improvidently, fraudulently, or collusively made.<sup>14</sup> Such an agreement may be entered into by an attorney even after judgment in favor of his client, and after the term, but within the time for procuring an appeal or writ of error,<sup>15</sup> and even though the case, the result of which is to bind the parties, is conducted by other coun-

<sup>10</sup> *Ludeman v. Third Ave. R. Co.*, 72 App. Div. 26, 76 N. Y. S. 128.

<sup>11</sup> *Alton v. Gilmanton*, 2 N. H. 520; *Daniel v. Ray*, 1 Hill L. (S. C.) 32.

Where, prior to the death of a passenger from injuries sustained, a suit was brought to perpetuate his testimony, and the carrier's general attorney, before the passenger's deposition was taken, agreed with plaintiff and such passenger that if he would not give his deposition until after the physician advised that he would die, or if anything should happen that he did not so testify, evidence might be given in any suit thereafter brought by plaintiff or others as to what such passenger said was the cause, character, and extent of his injuries, and the deposition was then abandoned, such agreement was within the scope of the attorney's authority. *Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29.

<sup>12</sup> *Louisville Trust Co. v. Stone*, 88 Fed. 407, *affirmed* 174 U. S. 429, 19 S. Ct. 875, 43 U. S. (L. ed.) 1034; *Eidam v. Finnegan*, 48 Minn. 53, 50 N.

W. 933, 16 L.R.A. 507; *Dewar v. Orr*, 3 Ch. Chamb. (Ont.) 224.

<sup>13</sup> *United States v. Stone v. Bank of Commerce*, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125, *reversing* 127 Fed. 387.

*Georgia*.—*Commercial Union Assur. Co., v. Chattahoochee Lumber Co.*, 130 Ga. 191, 60 S. E. 554.

*Iowa*.—*Ohlquest v. Farwell*, 71 Iowa 231, 32 N. W. 277.

*Kansas*.—*Southern Kansas R. Co. v. Pavey*, 57 Kan. 521, 46 Pac. 969.

*Minnesota*.—*Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L.R.A. 507.

*Missouri*.—*North Missouri R. Co. v. Stephens*, 36 Mo. 150, 88 Am. Dec. 138; *Schaeffer v. Siegel*, 9 Mo. App. 594; *Galbreath v. Rogers*, 30 Mo. App. 401; *Scarritt Furniture Co. v. Moser*, 48 Mo. App. 543.

<sup>14</sup> *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L.R.A. 507.

<sup>15</sup> *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125, *reversing* 127 Fed. 387.

sel.<sup>16</sup> The suit must be actually pending, however, and not merely in contemplation.<sup>17</sup> But an attorney employed by a guardian ad litem has no such general authority. Such a stipulation does not bind the minor unless approved and ratified by the court on proof that it is for the interest, or at least not against the interest, of the minor, and it must also appear that the matters in controversy in the two actions were, so far as the minor was concerned, precisely the same, and that the same guardian ad litem appeared for him in both actions.<sup>18</sup> An attorney has no power by virtue of his retainer to bind his client by an agreement that the client's case shall depend on the result of another case, having nothing in common with it except identity of parties.<sup>19</sup>

**§ 263. Waiver of Client's Rights.** — An attorney has not, by virtue of his general authority, the right to waive his client's substantial rights by stipulation or otherwise.<sup>20</sup> Thus he cannot compromise or release the client's just demands,<sup>1</sup> or waive a substantial defense,<sup>2</sup> such, for instance, as the statute of limitations,<sup>3</sup> or the requirement of the filing of a claim in administration proceedings.<sup>4</sup> Nor can counsel employed to defend in one action, barter away their client's rights in another.<sup>5</sup> This section should be read in connection with the other sections appearing in this subdivision.<sup>6</sup> It is evident that an attorney's authority to make admissions of

<sup>16</sup> *Scarritt Furniture Co. v. Moser*, 48 Mo. App. 543.

<sup>17</sup> *Stone v. Bank of Commerce*, 174 U. S. 412, 19 S. Ct. 747, 43 U. S. (L. ed.) 1028.

<sup>18</sup> *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L.R.A. 507.

<sup>19</sup> *Dewar v. Orr*, 3 Ch. Chamb. (Ont.) 224. See also *supra*, note 12, this section.

<sup>20</sup> *Bush v. Visant*, 40 Ark. 124; *Winn's Succession*, 30 La. Ann. 702; *Person v. Leathers*, 67 Miss. 548, 7 So. 391. See also *In re Devoe*, Myr. Prob. (Cal.) 6, wherein the party in interest was a minor.

<sup>1</sup> See *supra*, §§ 215-228.

<sup>2</sup> *Warwick v. Marlatt*, 25 N. J. Eq. 188. See also *Arthur v. Homestead Fire Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550.

<sup>3</sup> See *Spreckels v. Ord*, 72 Cal. 86, 13 Pac. 158; *Houghton v. Ellis*, 19 Colo. App. 125, 73 Pac. 752; *Steele v. Jennings*, 1 McMull. L. (S. C.) 297; *Walrod v. Manson*, 23 Wis. 393, 99 Am. Dec. 187; *Brown v. Parker*, 28 Wis. 21; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739.

<sup>4</sup> *Andrews v. O'Reilly*, 34 R. I. 256, 83 Atl. 119.

<sup>5</sup> *Marbourg v. Smith*, 11 Kan. 554.

<sup>6</sup> See *supra*, § 258 et seq.

fact may warrant him, when acting in good faith, in waiving what would otherwise constitute a good defense.<sup>7</sup> So, the implied authority of an attorney respecting matters of procedure<sup>8</sup> has been held to warrant the allowance of an amendment, by the adverse party, so as to render available to him a defense which otherwise he could not set up.<sup>9</sup>

**§ 264. Manner of Stipulating.**—In nearly every jurisdiction it is now required, either by virtue of statutory or court rule regulation, that all stipulations agreed upon by counsel, and particularly those which affect the substantial rights of the parties, shall be reduced to writing, signed by the attorneys for the respective parties, and filed of record in the cause.<sup>10</sup> In the absence of such regulation, however, both the attorneys and their clients will be bound by oral stipulations fairly and honestly made,<sup>11</sup> subject, however, to the discretionary supervision of the court.<sup>12</sup> So, stipulations made in open court are, as a rule, as effective as if agreed upon in writing and filed.<sup>13</sup> And a client is bound by a statement of his counsel in his presence unless he then and there repudiates it.<sup>14</sup> It has been held that a statute authorizing an attorney to bind his client by his agreement filed with the clerk or entered on the minutes of the court, refers only to executory agreements; and where by a verbal stipulation one party has received an advantage, or another party has, at his instance, given up some right or lost some advantage, so that it would be inequitable to insist that the

<sup>7</sup> See *Bingham v. Winona County*, 6 Minn. 136.

<sup>8</sup> See *supra*, § 260.

<sup>9</sup> *Brown v. Spiegel*, 156 Mich. 138, 120 N. W. 579, 16 Detroit Leg. N. 43.

<sup>10</sup> *California*.—*Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940; *Ephraim v. Pacific Bank*, 149 Cal. 222, 86 Pac. 507; *Daneri v. Gazzola*, 2 Cal. App. 351, 83 Pac. 455.

*Indiana*.—*Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713.

*Iowa*.—*Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594.

*Michigan*.—*Scott v. Chambers*, 62 Mich. 532, 29 N. W. 94.

*New York*.—*Jefferson Bank v. Gossett*, 45 Misc. 630, 90 N. Y. S. 1049.

*South Dakota*.—*Gibson v. Allen*, 18 S. D. 417, 100 N. W. 1096.

<sup>11</sup> See *Godwin v. State*, 1 Boyce (Del.) 173, 74 Atl. 1101.

<sup>12</sup> *Howe v. Lawrence*, 22 N. J. L. 99. And see *supra*, § 260 notes.

<sup>13</sup> *Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940; *Godwin v. State*, 1 Boyce (Del.) 173, 74 Atl. 1101.

<sup>14</sup> *Tolbert v. State*, (Ga.) 78 S. E. 131.

stipulation was invalid, the party benefited will not be permitted to repudiate the agreement, on the ground that it was not entered on the minutes of the court, to the prejudice of the other party.<sup>15</sup> But where a statute provided that no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court, it was held that an affidavit of one of the attorneys was not competent evidence of an agreement between him and the attorney for the adverse party.<sup>16</sup>

**§ 265. Admissions and Stipulations Made under Mistake of Fact.** — It is a settled principle with the court, that its suitors shall not be prejudiced by the mistakes or misprisions of its officers; <sup>17</sup> and, on a sufficient showing thereof, relief will be afforded where, under a mistake of fact, an attorney has, on behalf of his client, entered into a stipulation,<sup>18</sup> or made an admission,<sup>19</sup> which otherwise would have bound his client. It has been held, however, that a stipulation cannot be set aside for a mistake caused by the negligence of the attorney alleging it, and not occasioned in any way by the opposing attorney; especially where the latter has been induced by the agreement to change his position.<sup>20</sup>

*Trial, Arbitration and Reference.*

**§ 266. Conduct of Trial.** — Whatever is done by the attorney in the progress of a trial is considered as having been done by

<sup>15</sup> *Daneri v. Gazzola*, 2 Cal. App. 351, 83 Pac. 455. See also *Rogers v. Greenwood*, 14 Minn. 333.

<sup>16</sup> *Baily v. Birkhofer*, 123 Ia. 59, 98 N. W. 594. See also *Gibson v. Allen*, 18 S. D. 417, 100 N. W. 1096.

<sup>17</sup> *Neele v. Berryhill*, 4 How. Pr. (N. Y.) 16.

<sup>18</sup> *Alabama*.—*Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344.

*Minnesota*.—*Schaefer v. Schoenborn*, 94 Minn. 490, 103 N. W. 501.

*Mississippi*.—*Parker v. McBee*, 61 Miss. 134.

*Missouri*.—*St. Louis & S. F. R. Co. v. Epperson*, 97 Mo. 300, 10 S. W. 478.

*Tennessee*.—*Gates v. Brinkley*, 4 Lea 710.

*Vermont*.—*U. S. v. U. S. Fidelity & Guaranty Co.*, 83 Vt. 278, 75 Atl. 280.

<sup>19</sup> *Parker v. McBee*, 61 Miss. 134; *U. S. v. U. S. Fidelity & Guaranty Co.*, 83 Vt. 278, 75 Atl. 280.

<sup>20</sup> *Rogers v. Greenwood*, 14 Minn. 333.



the authority of, and is binding on, his client.<sup>1</sup> Thus an appellant is bound by the attitude taken by his attorney on the trial as to the nature of the action, although on appeal he is represented by a different attorney.<sup>2</sup> So, an attorney may waive objections to the admission of evidence,<sup>3</sup> and make any admission of fact which the party himself could have made;<sup>4</sup> an agreement on a matter of law, however, will be disregarded.<sup>5</sup> An attorney may also waive a trial by jury.<sup>6</sup> So he may when necessary agree to the withdrawal of a

<sup>1</sup> *United States*.—*Manning v. Hayden*, 5 Sawy. 360, 16 Fed. Cas. No. 9,043.

*Alabama*.—*Rosenbaum v. State*, 33 Ala. 354.

*California*.—*Mott v. De Reyes*, 45 Cal. 379.

*Colorado*.—*Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

*Kentucky*.—*Smith v. Dixon*, 3 Metc. 438.

*Maryland*.—*Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300; *Thornburg v. Macauley*, 2 Md. Ch. 425; *African Methodist Bethel Church v. Carmack*, 2 Md. Ch. 143.

*New Jersey*.—*McDowell v. Perrine*, 36 N. J. Eq. 632.

*New York*.—*Deen v. Milne*, 41 Hun 645 mem., 4 N. Y. St. Rep. 129.

*North Carolina*.—*Greenlee v. McDowell*, 39 N. C. 481; *Guy v. Manuel*, 89 N. C. 83.

*A waiver of all informalities and irregularities made by a counselor who has the sole charge of a cause, is binding upon his client.* *Hanson v. Hoitt*, 14 N. H. 56.

<sup>2</sup> *Peteler Portable R. Mfg. Co. v. Northwestern Adamant Mfg. Co.*, 60 Minn. 127, 61 N. W. 1024.

*Bound by Attorney's Mistake*.—A client is concluded by the acts of his counsel in making a mistake as to the defense to be pleaded to a suit, espe-

cially where the client did not seek to have the mistake corrected, but relied on it both in the trial court, where he was present, and on appeal. *Jamison v. May*, 13 Ark. 600.

<sup>3</sup> *In re Ross*, 136 Cal. 629, 69 Pac. 430; *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321.

*Where an attorney is employed merely to attend the taking of a deposition, he cannot waive exceptions to the competency of a witness, the pertinency of his testimony, or its admissibility under the pleadings.* *McClurg v. Willard*, 5 Watts (Pa.) 275.

<sup>4</sup> *Alabama*.—*Starke v. Kenan*, 11 Ala. 818.

*Illinois*.—*Wilson v. Spring*, 64 Ill. 14.

*Kentucky*.—*Talbot v. McGee*, 4 T. B. Mon. 375.

*Maryland*.—*Farmers' Bank v. Sprigg*, 11 Md. 389.

*New Hampshire*.—*Alton v. Gilman*, 2 N. H. 520; *Page v. Brewster*, 54 N. H. 184.

*Ohio*.—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L.R.A. 321.

*Tennessee*.—*Tomeny v. German Nat. Bank*, 9 Heisk. 493.

*Admissions as evidence* have been considered at §§ 193-198.

<sup>5</sup> *Holms v. Johnston*, 12 Heisk. (Tenn.) 155.

<sup>6</sup> *Whitestown Milling Co. v. Zahn*,

juror,<sup>7</sup> or to a continuance,<sup>8</sup> or to a joinder of parties,<sup>9</sup> or that judgment be rendered on the pleadings,<sup>10</sup> or that a case shall be tried on its merits without pleadings,<sup>11</sup> or that the opinion of a certain court shall be conclusive,<sup>12</sup> or to dismiss his client's demand for his second trial in an action of ejectment,<sup>13</sup> or to try his client for a misdemeanor in his absence.<sup>14</sup> Matters of this nature have been considered generally in connection with stipulations.<sup>15</sup>

**§ 267. Arbitration and Reference.** — As a general rule, it is within the implied power of an attorney to arbitrate or refer a cause of action in which he has been retained,<sup>16</sup> and to consent of

<sup>9</sup> Ind. App. 270, 36 N. E. 653; *Lacoste v. Roberts*, 11 La. Ann. 33; *Smith v. Barnes*, 9 Misc. 368, 29 N. Y. S. 692. See also

<sup>7</sup> *Strauss v. Francis*, L. R. 1 Q. B. (Eng.) 379, 7 B. & S. 365, 12 Jur. N. S. 486, 35 L. J. Q. B. 133, 14 L. T. N. S. 326, 14 W. R. 634.

<sup>8</sup> *Strong v. District of Columbia*, 3 MacArthur (D. C.) 499; *Handy v. McClellan*, 156 Mo. App. 454, 137 S. W. 280; *Stinnard v. New York Fire Ins. Co.*, 1 How. Pr. (N. Y.) 169. See also *Nightingale v. Oregon Cent. R. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10, 264.

Where plaintiff's counsel had not prepared for trial, relying on a conversation with defendant's counsel from which he, in good faith, believed that a continuance would be agreed to, or that he would have been notified to the contrary in time to have prepared for trial, it was held that the defendant's counsel, in the furtherance of professional honor, would have been justified in withdrawing from the case on his client refusing to consent to the continuance. *Handy v. McClellan*, 156 Mo. App. 454, 137 S. W. 280.

*But an agreement among counsel, for their own convenience, that they*

will not try causes during the summer months, has been held not to be legally binding on the parties to it. *Robert v. Commercial Bank*, 13 La. 528, 33 Am. Dec. 570.

<sup>9</sup> *Fling v. Trafton*, 13 Me. 295.

<sup>10</sup> *McCann v. McLennan*, 3 Neb. 25.

<sup>11</sup> *Cook v. Allen*, 67 N. Y. 578, wherein it appears that the pleadings were lost.

<sup>12</sup> *Galbreath v. Colt*, 4 Yeates (Pa.) 551.

<sup>13</sup> *Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262.

<sup>14</sup> *Martin v. State*, 40 Ark. 364 (under statute).

<sup>15</sup> See *supra*, § 258 et seq.

<sup>16</sup> *England*.—*Matter of Jamieson*, 4 Ad. & El. 945, 31 E. C. L. 231; *Bodington v. Harris*, 1 Bing. 187, 8 E. C. L. 464; *Dowse v. Cox*, 3 Bing. 20, 11 E. C. L. 12; *Colledge v. Horn*, 3 Bing. 119, 11 E. C. L. 59; *Swinfen v. Swinfen*, 18 C. B. 485, 86 E. C. L. 485; *Buckle v. Roach*, 1 Chit. 193, 18 E. C. L. 64; *In re Hobler*, 8 Beav. 101; *Baillie v. Edinburgh Oil Gas Light Co.*, 3 Cl. & F. 639; *Paull v. Paull*, 2 Crompt. & M. 235; *Thomas v. Hewes*, 2 Crompt. & M. 519; *Adams v. Bankart*, 1 C. M. & R. 681; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344;

record that the award be made the judgment of the court;<sup>17</sup> and in some jurisdictions counsel have authority to bind the parties by an agreement that the decision of the arbitrators shall be final.<sup>18</sup> It is immaterial that the client whose cause is submitted to arbi-

*Swinfen v. Chelmsford*, 5 H. & N. 890; *Mole v. Smith*, 1 Jac. & W. 645; *Rumsey v. King*, 33 L. T. N. S. 728; *Reg. v. Helston*, 10 Mod. 202; *Furnival v. Bogle*, 4 Russ. 142; *Latuch v. Pash-erante*, 1 Salk. 86; *Elworthy v. Bird*, 1 Tamlyn 43; *Griffiths v. Williams*, 1 T. R. 710; *Banfill v. Leigh*, 8 T. R. 571.

*United States*.—*Alexandria Canal Co. v. Swann*, 5 How. 83, 12 U. S. (L. ed.) 60; *Holker v. Parker*, 7 Cranch 436, 3 U. S. (L. ed.) 396; *Denny v. Brown*, 7 Fed. Cas. No. 3,805; *Abbe v. Rood*, 6 McLean 106, 1 Fed. Cas. No. 6.

*Alabama*.—*Beverly v. Stephens*, 17 Ala. 701.

*California*.—*Bates v. Visser*, 2 Cal. 355.

*Colorado*.—*Lee v. Grimes*, 4 Colo. 185.

*Georgia*.—*Wade v. Powell*, 31 Ga. 1; *McElreath v. Middleton*, 89 Ga. 83, 14 S. E. 906.

*Kentucky*.—*Talbot v. McGee*, 4 T. B. Mon. 377; *Smith v. Dixon*, 3 Metc. 438.

*Maine*.—*Gregory v. Pike*, 94 Me. 27, 46 Atl. 793.

*Maryland*.—*Jones v. Horsey*, 4 Md. 306, 59 Am. Dec. 81; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

*Massachusetts*.—*Everett v. Charles-town*, 12 Allen 93; *Buckland v. Conway*, 16 Mass. 396.

*Mississippi*.—*Jenkins v. Gillespie*, 10 Smedes & M. 31, 48 Am. Dec. 732.

*New Hampshire*.—*Pike v. Emerson*,

5 N. H. 393, 22 Am. Dec. 468; *Brooks v. New Durham*, 55 N. H. 559.

*New Jersey*.—*Paret v. Bayonne*, 39 N. J. L. 559.

*New York*.—*Gorham v. Gale*, 7 Cow. 744, 17 Am. Dec. 549; *Tilton v. U. S. Life Ins. Co.*, 8 Daly 84; *Tiffany v. Lord*, 40 How. Pr. 481. Compare *McPherson v. Cox*, 86 N. Y. 472.

*North Carolina*.—*Morris v. Grier*, 76 N. C. 410.

*Ohio*.—*Champaign County Treasurer v. Norton*, 1 Ohio 270.

*Pennsylvania*.—*Somers v. Balabrega*, 1 Dall. 164, 1 U. S. (L. ed.) 83; *Wilson v. Young*, 9 Pa. St. 101; *Bingham v. Guthrie*, 19 Pa. St. 418; *Coleman v. Grubb*, 23 Pa. St. 393; *Stokely v. Robinson*, 34 Pa. St. 315; *Evars v. Kamphaus*, 59 Pa. St. 379; *Williams v. Danziger*, 91 Pa. St. 232; *Williams v. Tracey*, 95 Pa. St. 308; *Sargeant v. Clark*, 108 Pa. St. 588; *Campbell v. Fayette County*, 6 Pa. Co. Ct. 132. See also *Cahill v. Benn*, 6 Bin. 99; *Willis v. Willis*, 12 Pa. St. 159.

*South Carolina*.—*Smith v. Bossard*, 2 McCord Eq. 406.

*Wisconsin*.—*Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252.

<sup>17</sup> *Beverly v. Stephens*, 17 Ala. 701.

<sup>18</sup> *Millar v. Criswell*, 3 Pa. St. 449; *Wilson v. Young*, 9 Pa. St. 101; *Bingham v. Guthrie*, 19 Pa. St. 418; *Sargeant v. Clark*, 108 Pa. St. 588. See also *Babb v. Stromberg*, 14 Pa. St. 397; *Evars v. Kamphaus*, 59 Pa. St. 379; *Williams v. Danziger*, 91 Pa. St. 232.

tration is a private,<sup>19</sup> or a municipal corporation.<sup>20</sup> So, a federal district attorney has authority, in a proceeding by the United States to condemn land, to submit to an arbitration.<sup>1</sup> In this country the general doctrine that an attorney has power to submit a matter in dispute to arbitration is limited to a pending suit which he has been retained to manage;<sup>2</sup> in England, however, submissions made by attorneys of all matters in difference between their clients and third parties have been upheld,<sup>3</sup> even where the client distinctly directed the attorney not to agree to such submission.<sup>4</sup> The authority of an attorney to arbitrate cannot be delegated to another without the client's consent.<sup>5</sup> So, also, his authority may be restricted by express negative words.<sup>6</sup> In some states an attorney's agreement to arbitrate a cause will not bind the client unless he consents thereto.<sup>7</sup> In Pennsylvania an attorney cannot submit matters of his client to arbitration when it would endanger the client's title to real estate;<sup>8</sup> and in Massachusetts a party is entitled, if the award is adverse, to a jury trial upon the question of the attorney's authority.<sup>9</sup> But if a party makes no application to strike off a submission entered into by his attorney, the presumption is that it was made with his consent;<sup>10</sup> so, a client will be bound by the submission where he appears before the arbitrators,

<sup>19</sup> *Faviell v. Eastern Counties R. Co.*, 2 Exch. (Eng.) 344; *Alexandria Canal Co. v. Swann*, 5 How. 83, 12 U. S. (L. ed.) 60.

<sup>20</sup> *Connett v. Chicago*, 114 Ill. 233, 29 N. E. 280; *Buckland v. Conway*, 16 Mass. 396; *Paret v. Bayonne*, 39 N. J. L. 559. See also *Everett v. Charlestown*, 12 Allen (Mass.) 93.

<sup>1</sup> *Judson v. U. S.*, 120 Fed. 637, 57 C. C. A. 99.

<sup>2</sup> *Scarborough v. Reynolds*, 12 Ala. 252; *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732; *Stinerville & B. Stone Co. v. White*, 25 Misc. 314, 54 N. Y. S. 577; *Markley v. Amos*, 8 Rich. L. (S. C.) 468; *McGinnis v. Curry*, 13 W. Va. 29.

<sup>3</sup> *Dowse v. Coxe*, 3 Bing. 20, 11 E. C. L. 12.

<sup>4</sup> *Smith v. Troup*, 7 C. B. 757, 62 E. C. L. 757; *Filmer v. Delber*, 3 Taunt. (Eng.) 486. See also *Thomas v. Hewes*, 2 Crompt. & M. (Eng.) 519; *Faviell v. Eastern Counties R. Co.*, 2 Exch. (Eng.) 344; *Arnold v. Poole*, 4 M. & G. 860, 43 E. C. L. 444.

<sup>5</sup> *Wright v. Evans*, 53 Ala. 103. As to the delegation of authority generally, see § 210.

<sup>6</sup> *Haynes v. Wright*, 4 Hayw. (Tenn.) 63.

<sup>7</sup> *King v. King*, 104 La. 420, 29 So. 205; *McGinnis v. Curry*, 13 W. Va. 29.

<sup>8</sup> *Naglee v. Ingersoll*, 7 Pa. St. 185; *Lew v. Nolan*, 8 Pa. Dist. Ct. 531.

<sup>9</sup> *Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609.

<sup>10</sup> *Millar v. Criswell*, 3 Pa. St. 449.

without objection, and takes part in the hearing;<sup>11</sup> nor will a party be heard to complain where the submission was clearly for his benefit.<sup>12</sup> But an award was held to be void where an attorney agreed to submit a cause to arbitration, without his client's consent, on condition that the award should be void unless approved by the client, who thereafter dissented.<sup>13</sup> So, a client may revoke a submission entered into by his attorney before it is acted on,<sup>14</sup> or he may apply to the court to have it set aside.<sup>15</sup> In submitting a cause to arbitrators or to a referee it is necessary that statutory and court rule requirements be strictly complied with;<sup>16</sup> usually the submission must be in writing,<sup>17</sup> though in some instances an oral submission has been upheld.<sup>18</sup> An attorney cannot change the terms of an agreement to submit which has been entered into by his client,<sup>19</sup> but it has been held that he may enter into an agreement to extend the time for making the award.<sup>20</sup>

<sup>11</sup> *Diedrick v. Richley*, 2 Hill (N. Y.) 271. As to ratification generally, see §§ 211-214.

<sup>12</sup> A party who was absent when his case was called for trial shall not be allowed to repudiate the act of his attorney agreeing in open court to a reference to arbitrators; the benefit of the delay is a consideration for the submission which renders it irrevocable. *Williams v. Tracey*, 95 Pa. St. 308.

<sup>13</sup> *Markley v. Amos*, 2 Bailey L. (S. C.) 603.

<sup>14</sup> *Wilson v. Young*, 9 Pa. St. 101; *Coleman v. Grubb*, 23 Pa. St. 393.

<sup>15</sup> *Millar v. Criswell*, 3 Pa. St. 449.

<sup>16</sup> *England*.—*Mitchell v. Harris*, 2 Ves. Jr. 137.

*California*.—*Bates v. Visser*, 2 Cal. 355.

*Connecticut*.—*Daniels v. New London*, 58 Conn. 156, 19 Atl. 573, 7 L.R.A. 563.

*Mississippi*.—*Jenkins v. Gillespie*, 10 Smedes & M. 31, 48 Am. Dec. 732.

*Pennsylvania*.—*Millar v. Criswell*,

3 Pa. St. 449; *Stokely v. Robinson*, 34 Pa. St. 315; *Evars v. Kamphaus*, 59 Pa. St. 379.

*South Carolina*.—*Markley v. Amos*, 8 Rich. L. 468.

<sup>17</sup> *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692. See also *Sutton v. Dickinson*, 9 Leigh (Va.) 142.

<sup>18</sup> *Everett v. Charlestown*, 12 Allen (Mass.) 93; *Faggard v. Williamson*, 4 Tex. Civ. App. 337, 23 S. W. 557.

An oral agreement made in open court and entered at the time by the clerk, has been held to constitute a sufficient submission. *Millar v. Criswell*, 3 Pa. St. 449; *Stokely v. Robinson*, 34 Pa. St. 315.

<sup>19</sup> *Daniels v. New London*, 58 Conn. 156, 19 Atl. 573, 7 L.R.A. 563; *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 31, 48 Am. Dec. 732. See also *Willis v. Willis*, 12 Pa. St. 159; *Wilson v. United Counties of Huron*, etc., 11 U. C. C. P. 548.

<sup>20</sup> *Rex v. Hill*, 7 Price (Eng.) 636; *Oakes v. Halifax*, 4 Can. Sup. Ct. 640.

*Judgments and Decrees.*

§ 268. Confession of Judgment. — It is well settled that an attorney may confess judgment for his client<sup>1</sup> as a legitimate incident of his professional relation to the cause,<sup>2</sup> the record being *prima facie* evidence that he was duly authorized to do so.<sup>3</sup> No special authorization is required;<sup>4</sup> nor is it necessary to file a warrant of attorney for this purpose.<sup>5</sup> The attorney's authority to

<sup>1</sup> *United States*.—Denny v. Brown, 7 Fed. Cas. No. 3,805; Harniska v. Dolph, 133 Fed. 158, 66 C. C. A. 224. *Alabama*.—Beverly v. Stephens, 17 Ala. 701.

*Georgia*.—Lyon v. Williams, 42 Ga. 168; Taylor v. American Freehold Land Mortg. Co., 106 Ga. 238, 32 S. E. 153. See also Webster v. Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310.

*Illinois*.—Wilson v. Spring, 64 Ill. 18 *dictum*; Chalmers v. Tandy, 111 Ill. App. 252; Meriden Hydro-Carbon Arc Light Co. v. Anderson, 111 Ill. App. 449. Compare People v. Lam-born, 1 Scam. 123; Wadhams v. Gay, 73 Ill. 415.

*Indiana*.—Hudson v. Allison, 54 Ind. 215; Thompson v. Pershing, 86 Ind. 303; Devenbaugh v. Nifer, 3 Ind. App. 379, 29 N. E. 923; Wilkie v. Reynolds, 34 Ind. App. 527, 72 N. E. 179.

*Kentucky*.—Holbert v. Montgomery, 5 Dana 14; Talbot v. McGee, 4 T. B. Mon. 377; Graves v. Long, 87 Ky. 441, 9 S. W. 297.

*New York*.—Denton v. Noyes, 6 Johns. 296, 5 Am. Dec. 237.

*North Carolina*.—Hairston v. Garwood, 123 N. C. 345, 31 S. E. 653.

*Pennsylvania*.—King v. Cartee, 1 Pa. St. 147; Cyphert v. McClune, 22

Pa. St. 195; Flanigen v. Philadelphia, 51 Pa. St. 491.

*Tennessee*.—Jones v. Williamson, 5 Coldw. 371.

*Action for Statutory Penalty*.—A judgment may be confessed by an attorney on behalf of his client in an action of debt brought for the purpose of recovering a statutory penalty. Chalmers v. Tandy, 111 Ill. App. 252.

<sup>2</sup> Lyon v. Williams, 42 Ga. 168.

<sup>3</sup> *United States*.—Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 U. S. (L. ed.) 932.

*Alabama*.—Hill v. Lambert, Minor 91.

*Georgia*.—Dobbins v. Dupree, 39 Ga. 394.

*Illinois*.—Wilson v. Spring, 64 Ill. 14.

*Michigan*.—Arnold v. Nye, 23 Mich. 286.

*New Jersey*.—Gifford v. Thorn, 9 N. J. Eq. 702; Ward v. Price, 25 N. J. L. 225.

*Ohio*.—Lowellville Coal Mining Co. v. Zappio, 80 Ohio St. 458, 89 N. E. 97.

*Pennsylvania*.—Cyphert v. McClune, 22 Pa. St. 195.

*Texas*.—Merritt v. Clow, 2 Tex. 582.

<sup>4</sup> Lyon v. Williams, 42 Ga. 168.

<sup>5</sup> Tanner v. Hopkins, 12 W. N. C. (Pa.) 238.

confess judgment will be presumed,<sup>6</sup> even though there has been no service of process,<sup>7</sup> or though it subsequently appears that the attorney had no authority to make the confession,<sup>8</sup> excepting in vacation time; as to judgments then confessed the attorney's authority should affirmatively appear.<sup>9</sup> A judgment so confessed is binding on the client in the absence of fraud, collusion, surprise, or some ground of the same nature,<sup>10</sup> unless, perhaps, where it appears that the attorney is insolvent.<sup>11</sup> The authority to confess judgment may be exercised in courts not of record as well as in courts of record.<sup>12</sup> It has been held, however, that the presumption that an attorney who confesses judgment is duly authorized so to do, may be rebutted,<sup>13</sup> and if so rebutted, the judgment should be set aside.<sup>14</sup> An injustice to the client will not be permitted;<sup>15</sup> thus the client will not be bound where his attorney confesses judgment for more than is actually due.<sup>16</sup> So, a power authorizing an attorney to appear in court and confess judgment on a note, does not authorize the entry of such appearance before the maturity of the note,<sup>17</sup> or a confession of judgment in favor of an indorsee.<sup>18</sup> Nor does power to confess judgment confer authority to do so after the debt has been barred by the statute of limitations;<sup>19</sup> nor, in such case, can judgment be confessed in another

<sup>6</sup> *Martin v. Judd*, 60 Ill. 78.

<sup>7</sup> *Martin v. Judd*, 60 Ill. 78; *Holbert v. Montgomery*, 5 Dana (Ky.) 11; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

<sup>8</sup> *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

<sup>9</sup> *Martin v. Judd*, 60 Ill. 78.

<sup>10</sup> *Meriden Hydro-Carbon Arc Light Co. v. Anderson*, 111 Ill. App. 449.

<sup>11</sup> *Meriden Hydro-Carbon Arc Light Co. v. Anderson*, 111 Ill. App. 449. See also *Holmes v. Rogers*, 13 Cal. 191.

<sup>12</sup> *Chalmers v. Tandy*, 111 Ill. App. 252.

<sup>13</sup> *Dobbins v. Dupree*, 39 Ga. 394.

An attorney may testify that a confession of judgment against his

client, entered by himself, was without authority. *Berg v. McLafferty*, (Pa.) 12 Atl. 460.

<sup>14</sup> *Dobbins v. Dupree*, 39 Ga. 394. See also *Chicago Bldg. Soc. v. Haas*, 111 Ill. 176.

<sup>15</sup> *Sherman v. Brenner*, 1 W. N. C. (Pa.) 193.

<sup>16</sup> *Askew v. Goddard*, 17 Ill. App. 377; *Dilley v. Van Wie*, 6 Wis. 209.

<sup>17</sup> *Lewis v. Moon*, 1 Ohio Cir. Dec. 116, 1 Ohio Cir. Ct. 211.

<sup>18</sup> *Ream v. Merchants' Nat. Bank*, 1 Ohio Cir. Dec. 351, 2 Ohio Cir. Ct. 43.

<sup>19</sup> *Walrod v. Manson*, 23 Wis. 393, 99 Am. Dec. 187; *Brown v. Parker*, 28 Wis. 21; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739.

state where the debt is barred by limitation in the *locus contractus*.<sup>20</sup> The rule has no application in criminal cases.<sup>1</sup> In some jurisdictions an attorney cannot confess judgment against his client unless he has been expressly authorized to do so,<sup>2</sup> but it is not necessary that such authority should be in writing.<sup>3</sup>

§ 269. **Consenting to Entry of Judgment.** — An attorney may also consent in open court to the entry of judgment against his client in a pending cause<sup>4</sup> as effectively as if the client had personally consented thereto.<sup>5</sup> It is immaterial that the client may have a good defense to the action,<sup>6</sup> or that the attorney ex-

<sup>20</sup> *Brown v. Parker*, 28 Wis. 21.

<sup>1</sup> An attorney has no implied power to plead guilty in the absence of the defendant. *Ex p. Erickson*, 31 N. Bruns. 296.

<sup>2</sup> *California*.—*Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

*Iowa*.—*Bigler v. Toy*, 68 Ia. 688, 28 N. W. 17; *Ohlquest v. Farwell*, 71 Ia. 231, 32 N. W. 277; *Martin v. Capital Ins. Co.*, 85 Ia. 643, 52 N. W. 534; *Rhutasel v. Rule*, 97 Ia. 20, 65 N. W. 1013; *Kilmer v. Gallaher*, 112 Ia. 583, 84 N. W. 697, 84 Am. St. Rep. 358. *Compare Potter v. Parsons*, 14 Ia. 286.

*Louisiana*.—*Durnford v. Clark*, 3 La. 199; *Girard v. Hirsch*, 6 La. Ann. 651; *Edwards v. Edwards*, 29 La. Ann. 597. *Compare Dockham v. Potter*, 27 La. Ann. 73.

*Canada*.—*McNamee v. O'Brien*, 9 N. Bruns. 548; *Watt v. Clark*, 12 Ont. Pr. 359.

<sup>3</sup> *Flanigen v. Philadelphia*, 51 Pa. St. 491. See also *Continental Building & Loan Assoc. v. Woolf*, 12 Cal. App. 725, 108 Pac. 729.

<sup>4</sup> *United States*.—*Harniska v. Dolph*, 133 Fed. 158, 66 C. C. A. 224.

*California*.—*Security Loan & Trust*

*Co. v. Estudillo*, 134 Cal. 166, 66 Pac. 257.

*Georgia*.—*Webster v. Dundee Mortgage & Trust Co.*, 93 Ga. 278, 20 S. E. 310; *Taylor v. American Freehold Land-Mortgage Co.*, 106 Ga. 238, 32 S. E. 153.

*Indiana*.—*Hudson v. Allison*, 54 Ind. 215; *Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713; *Devenbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923.

*Louisiana*.—*Dangerfield v. Thruston*, 8 Mart. N. S. 232.

*Maryland*.—*Farmers' Bank v. Sprigg*, 11 Md. 389.

*Missouri*.—*Barlow v. Steel*, 65 Mo. 611.

*North Carolina*.—*Hairston v. Garwood*, 123 N. C. 345, 31 S. E. 653.

*Texas*.—*Dunman v. Hartwell*, 9 Tex. 495, 60 Am. Dec. 176.

<sup>5</sup> *Sterne v. Bentley*, 3 How. Pr. (N. Y.) 331, 1 Code Rep. 109.

*Counsel for a married woman* may agree to a consent verdict even though the case is one in which her right of homestead is in issue. *Webster v. Dundee Mortgage, etc., Co.*, 93 Ga. 278, 20 S. E. 310.

<sup>6</sup> *Thompson v. Pershing*, 86 Ind. 303.



ceeded his authority; <sup>7</sup> the client's remedy in such cases is against his attorney.<sup>8</sup> Every presumption is in favor of the attorney's authority and the validity of his conduct,<sup>9</sup> unless the contrary should be suggested on affidavit.<sup>10</sup> Where an attorney in open court verbally stipulates that an order or judgment may be entered, and agreeably thereto the order or judgment is entered, a statutory provision to the effect that "an attorney shall have authority to bind his client in any of the steps of an action by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise," cannot be invoked to the prejudice of the opposing party, as such a provision refers to executory agreements only.<sup>11</sup> But an attorney retained by one of two joint debtors, both of whom have been served with process, has no authority to appear for both, and consent to judgment against them.<sup>12</sup> Nor can an attorney consent to the entry of the judgment after the cause has been discontinued,<sup>13</sup> or dismissed.<sup>14</sup> So, the consent of an attorney to the entry of a judgment, otherwise void, cannot validate it, as, for instance, where the judge was disqualified,<sup>15</sup> or where the judgment was entered contrary to a statutory provision;<sup>16</sup> but it has been held that an attorney may agree to the entry of a judgment after the time prescribed by statute.<sup>17</sup>

**§ 270. Consenting to Entry of Decree.** — Decrees rendered fairly and honestly with the consent of the attorney of record are

<sup>7</sup> *Taylor v. American Freehold Land Mortg. Co.*, 106 Ga. 238, 32 S. E. 153.

<sup>8</sup> *Thompson v. Pershing*, 86 Ind. 303.

<sup>9</sup> *Dockham v. Potter*, 27 La. Ann. 73.

<sup>10</sup> *Dockham v. New Orleans*, 26 La. Ann. 302; *Dockham v. Potter*, 27 La. Ann. 73.

<sup>11</sup> *Continental Building & Loan Assoc. v. Woolf*, 12 Cal. App. 725, 108 Pac. 729.

<sup>12</sup> *Blodget v. Conklin*, 9 How. Pr. (N. Y.) 442.

<sup>13</sup> *Gilbert v. Vanderpool*, 15 Johns. (N. Y.) 242.

<sup>14</sup> *Hay v. Cole*, 11 B. Mon. (Ky.) 72.

<sup>15</sup> *Converse v. McArthur*, 17 Barb. (N. Y.) 410.

<sup>16</sup> *Tupperry v. Hertung*, 46 Mo. 135.  
*Party Constructively Summoned.*—An attorney appointed, under a statute, to defend a party constructively summoned cannot consent to a judgment against him. *Anderson v. Sutton*, 2 Duv. (Ky.) 480.

<sup>17</sup> *Beardsley v. Pope*, 88 Hun 560, 34 N. Y. S. 846, reversing 11 Misc. 117, 32 N. Y. S. 926.

as obligatory upon the client<sup>18</sup> as if they were entered by the court after a contest.<sup>19</sup> In the absence of fraud,<sup>20</sup> the consent of the attorney is, in law, equivalent to the consent of his client,<sup>1</sup> and the adverse party is entitled to assume that he has full authority to act for his client in this respect.<sup>2</sup> A stipulation filed by an attorney consenting to a decree against his client is part of the record in the cause, and, therefore, need not be recited or mentioned in the decree.<sup>3</sup> It has been held, however, that a letter authorizing an

<sup>18</sup> *United States*.—*Farmers' Trust, etc., Bank v. Ketchum*, 4 McLean 120, 8 Fed. Cas. No. 4,670.

*California*.—*Holmes v. Rogers*, 13 Cal. 191.

*Georgia*.—*Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133; *Hollenbeck v. Glover*, 128 Ga. 52, 57 S. E. 108.

*Illinois*.—*Haas v. Chicago Bldg. Soc.*, 80 Ill. 248.

*Kentucky*.—*Graves v. Long*, 87 Ky. 441, 9 S. W. 297.

*New York*.—*In re Maxwell*, 66 Hun 151, 21 N. Y. S. 209.

*Rhode Island*.—*Wilson v. Wilson*, 25 R. I. 446, 56 Atl. 773.

*Tennessee*.—*Jones v. Williamson*, 5 Coldw. 371.

*West Virginia*.—*Teter v. Irwin*, 69 W. Va. 200, Ann. Cas. 1913A 707, 71 S. E. 115.

<sup>19</sup> *Holmes v. Rogers*, 13 Cal. 191. See also *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 U. S. (L. ed.) 932.

<sup>20</sup> Where the attorney fraudulently and corruptly consents to a decree without the knowledge of his client, it may be set aside in an original bill for fraud. *Chicago Bldg. Soc. v. Haas*, 111 Ill. 176.

<sup>1</sup> *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133; *Hollenbeck v. Glover*, 128 Ga. 52, 57 S. E. 108.

*Attorney of Married Woman*.—Counsel of record representing mar-

ried women in pending litigation have as ample power to bind their clients in conducting and disposing of such litigation as have the counsel of other suitors, and decrees rendered with consent of counsel, without fraud, are obligatory upon such clients. *Williams v. Simmons*, 79 Ga. 655, 7 S. E. 133.

*Death of Attorney Does Not Prevent Entry of Decree*.—If an attorney agrees to the terms of a decree of which the client has notice, the attorney's death will not prevent the entry of the decree; and if the client wishes further representation, he should employ other counsel. *Edwards v. Turner*, (Tenn.) 47 S. W. 144.

*Collateral Attack*.—When a final decree is by its terms founded on consent, if the alleged consent was wanting for lack of mental concurrence by one of the parties, such party is not at liberty to gainsay the record and raise that question collaterally. *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133; *Hollenbeck v. Glover*, 128 Ga. 52, 57 S. E. 108.

<sup>2</sup> *Wilson v. Wilson*, 25 R. I. 446, 56 Atl. 773.

<sup>3</sup> *Haas v. Chicago Bldg. Soc.*, 80 Ill. 248. See also *Schmidt v. Oregon Gold Min. Co.*, 28 Ore. 26, 40 Pac. 406, 1014, 52 Am. St. Rep. 759.

attorney to dismiss a case, does not warrant him to consent to a decree which destroys his client's right of action.<sup>4</sup> Nor can an attorney consent to a decree in a cause wherein he represents conflicting interests.<sup>5</sup> The unauthorized entry of a decree may, of course, be ratified by the client.<sup>6</sup>

§ 271. Assignment of Judgment. — It is well settled that an attorney at law has no implied authority to assign,<sup>7</sup> or sell,<sup>8</sup> his client's judgment, even though he has been paid the full amount thereof;<sup>9</sup> nor does authority to compromise impart authority to assign.<sup>10</sup> The fact that an attorney collects the interest and re-

<sup>4</sup> *Jubilee Placer Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716.

See also *supra*, § 250.

<sup>5</sup> An attorney cannot be allowed to consent, on behalf of infants, to a decree, when he is also counsel for parties whose interests are adverse to such infants. *Walker v. Grayson*, 86 Va. 337, 10 S. E. 51.

As to representing conflicting interests generally, see §§ 174-182.

<sup>6</sup> *Teter v. Irwin*, 69 W. Va. 200, Ann. Cas. 1913A 707, 71 S. E. 115.

As to ratification generally, see §§ 211-214.

<sup>7</sup> *Alabama*.—*Boren v. McGhee*, 6 Port. 432, 31 Am. Dec. 696; *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

*Indiana*.—*Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790.

*Iowa*.—*Ritz v. Rea*, 135 N. W. 645.

*Kansas*.—*Mayer v. Sparks*, 3 Kan. App. 602, 45 Pac. 249.

*Louisiana*.—*Walden v. Grant*, 8 Mart. N. S. 565.

*Maine*.—*Wilson v. Wadleigh*, 36 Me. 496.

*Maryland*.—*Peacock v. Pembroke*, 8 Md. 348.

*Mississippi*.—*Clark v. Kingsland*, 1 Smedes & M. 248; *Head v. Gervais*, Attys. at L. Vol. I.—32.

1 Walk. 431, 12 Am. Dec. 577; *Rice v. Troup*, 62 Miss. 186.

*Missouri*.—*Wyatt v. Fromme*, 70 Mo. App. 614.

*Nebraska*.—*Henry, etc., Co. v. Halter*, 58 Neb. 685, 79 N. W. 616.

*Pennsylvania*.—*Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641; *Fassitt v. Middleton*, 47 Pa. St. 214, 86 Am. Dec. 535; *Rowland v. Slate*, 58 Pa. St. 196; *Bosler v. Searight*, 149 Pa. St. 241, 24 Atl. 303; *Ely v. Lamb*, 10 Pa. Co. Ct. 209.

*South Carolina*.—*Noonan v. Gray*, 1 Bailey L. 437; *Mayer v. Blease*, 4 S. C. 10.

*Tennessee*.—*Maxwell v. Owen*, 7 Cold. 630; *Baldwin v. Merrill*, 8 Humph. 132.

<sup>8</sup> *Wyatt v. Fromme*, 70 Mo. App. 613; *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641.

As to the disposition of the client's choses or other property generally, see *supra*, § 203.

<sup>9</sup> *Head v. Gervais*, Walk. (Miss.) 431, 12 Am. Dec. 577; *Maxwell v. Owen*, 7 Cold. (Tenn.) 630.

<sup>10</sup> *Mayer v. Blease*, 4 S. C. 10.

mits it to the judgment creditor, does not show such an agency on the part of the attorney as will validate an assignment of the judgment by him.<sup>11</sup> An attorney may, of course, be authorized by his client to assign or sell a judgment, and such authority may be inferred from the circumstances;<sup>12</sup> so, also, an unauthorized sale or assignment may be ratified by the client.<sup>13</sup>

§ 272. *Vacating Judgment.* — As a general rule, an attorney, even though he is the attorney of record, is not authorized to vacate a judgment entered in favor of his client;<sup>14</sup> nor may he agree to a new trial.<sup>15</sup> An attorney may, however, consent to the opening of a judgment by default so that a cause may be heard on its merits.<sup>16</sup> So, an attorney may be specially authorized to agree to the vacation of a judgment.<sup>17</sup> An objection that a judgment has been vacated without authority is not available to third parties; in the absence of a complaint by the client the authority of the attorneys will be presumed.<sup>18</sup>

§ 273. *Remittitur.* — An attorney has implied authority to enter a *remittitur*,<sup>19</sup> so that the judgment may agree with the amount claimed in the declaration,<sup>20</sup> or represent the actual in-

<sup>11</sup> *Ely v. Lamb*, 10 Pa. Co. Ct. 209.

<sup>12</sup> *Painter v. Gibson*, 88 Ia. 125, 55 N. W. 84; *Ely v. Lamb*, 10 Pa. Co. Ct. 209; *Schroeder v. Gillespie*, 2 Pa. Dist. Ct. 221.

<sup>13</sup> *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; *Marshall v. Moore*, 36 Ill. 321; *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641.

As to ratification generally, see *supra*, §§ 211-214.

<sup>14</sup> *Holbert v. Montgomery*, 5 Dana (Ky.) 11; *Kent v. Ricards*, 3 Md. Ch. 392; *Quinn v. Lloyd*, 5 Abb. Pr. N. S. (N. Y.) 281.

<sup>15</sup> *Holbert v. Montgomery*, 5 Dana (Ky.) 11.

<sup>16</sup> *Latuch v. Pasherante*, 1 Salk. (Eng.) 86; *Clussmae v. Merkel*, 8

*Bosw.* (N. Y.) 402; *Schelly v. Zink*, 13 Hun (N. Y.) 538; *Read v. French*, 28 N. Y. 285.

<sup>17</sup> *Holbert v. Montgomery*, 5 Dana (Ky.) 11.

<sup>18</sup> *Hookey v. Greenstein*, 119 App. Div. 209, 104 N. Y. S. 621.

<sup>19</sup> *Lamb v. Williams*, 1 Salk. (Eng.) 89, 6 Mod. 82; *Pickett v. Ford*, 4 How. (Miss.) 246.

*Verbal Authority to Enter Remittitur.*—An attorney of record for a corporation has power to enter a remittitur where verbally authorized so to do by the president of the corporation. *Case v. Hawkins*, 53 Miss. 702.

<sup>20</sup> *Pickett v. Ford*, 4 How. (Miss.) 246.

debtedness.<sup>1</sup> An attorney may also agree to the correction of an error, even though such correction reduces the amount of a verdict or judgment.<sup>2</sup> So, the judgment creditor may agree to a reduction of the judgment, and, in such case, his attorney will not be heard in opposition,<sup>3</sup> excepting, of course, where his rights are affected.

**§ 274. Compromise and Release.** — The authority of an attorney to compromise or release the substantial rights of his client has been considered heretofore,<sup>4</sup> and the principles there stated apply with equal force where the right involved is a judgment in favor of the client; thus the attorney has no implied power to compromise,<sup>5</sup> or release it, unless specially authorized by his client to do so.<sup>6</sup> The rights of innocent third persons will, however, be protected.<sup>7</sup>

<sup>1</sup> *Mead v. Buckner*, 2 La. 286.

<sup>2</sup> *Guay v. Andrews*, 8 La. Ann. 141; *Hill v. Bowyer*, 18 Grat. (Va.) 364.

<sup>3</sup> *Homans v. Tyng*, 56 App. Div. 383, 67 N. Y. S. 792.

<sup>4</sup> See *supra*, §§ 215-228.

<sup>5</sup> *Arkansas*.—*Moore v. Cairo & Fulton R. Co.*, 36 Ark. 262.

*California*.—*Trope v. Kerns*, 83 Cal. 553, 23 Pac. 691.

*Michigan*.—*Fetz v. Leyendecker*, 157 Mich. 355, 122 N. W. 100, 16 Detroit Leg. N. 408.

*Mississippi*.—*Rice v. Troup*, 62 Miss. 186.

*Missouri*.—*Schlemmer v. Schlemmer*, 107 Mo. App. 487, 81 S. W. 636.

*New Jersey*.—*Faughnan v. Klizabeth*, 58 N. J. L. 309, 33 Atl. 212.

*New York*.—*Lewis v. Woodruff*, 15 How. Pr. 539.

*Pennsylvania*.—*Gable v. Hain*, 1 Pen. & W. 264; *Ely v. Lamb*, 10 Pa. Co. Ct. 209; *Maxfield v. Carr*, 8 Kulp 214.

*Tennessee*.—*Baldwin v. Merrill*, 8 Humph. 132; *Conley v. Whitthorne*, 58 S. W. 380.

*West Virginia*.—*Harper v. Harvey*, 4 W. Va. 539.

*Illinois*.—*Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 68 N. E. 534.

*Kansas*.—*Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422.

*Kentucky*.—*Harrow v. Farrow*, 7 B. Mon. 126, 45 Am. Dec. 60.

*Maryland*.—*Horsev. Chew*, 65 Md. 555, 5 Atl. 466. See also *Little v. Edwards*, 69 Md. 499, 16 Atl. 134.

*Missouri*.—*State v. Clifford*, 124 Mo. 492, 28 S. W. 5, 8.

*Nebraska*.—*Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519.

*New Jersey*.—*Faughnan v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212.

*New York*.—*Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335.

*Pennsylvania*.—*Gray v. Howell*, 205 Pa. St. 211, 54 Atl. 774. See also *Lowry v. Clark*, 20 Pa. Super. Ct. 357.

<sup>7</sup> "Where the rights of third persons intervene, the question of estoppel comes in, as it would operate a fraud upon an innocent purchaser

### § 275. Receiving Payment and Entering Satisfaction.—

The attorney of record may, as a general rule, receive payment of a judgment entered in favor of his client,<sup>8</sup> and satisfy the same.<sup>9</sup> In the absence of notice to the debtor of the revocation of the attorney's authority,<sup>10</sup> payment so made to the attorney will bind the

without notice to allow a judgment which, when he purchased, bore upon its face the evidence that it was satisfied, to be opened and used as a lien upon the property purchased, even though it should be afterwards made to appear that the satisfaction was improperly entered." *Wheeler v. Alderman*, 34 S. C. 540, 13 S. E. 673, 27 Am. St. Rep. 842.

<sup>8</sup> *United States*.—*Erwin v. Blake*, 8 Pet. 18, 8 U. S. (L. ed.) 852.

*Alabama*.—*Frazier v. Parks*, 56 Ala. 363.

*Arkansas*.—*Miller v. Scott*, 21 Ark. 396; *Conway County v. Little Rock & Ft. S. R. Co.*, 39 Ark. 50.

*Colorado*.—*Black v. Drake*, 2 Colo. 330.

*Connecticut*.—*Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

*Illinois*.—*Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202.

*Indiana*.—*Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006.

*Iowa*.—*Harbach v. Colvin*, 73 Iowa 638, 35 N. W. 663.

*Kentucky*.—*Canterberry v. Com.*, 1 Dana 416.

*Massachusetts*.—*Lewis v. Gamage*, 1 Pick. 347; *Langdon v. Potter*, 13 Mass. 320.

*Missouri*.—*Rhinchart v. New Madrid Banking Co.*, 99 Mo. App. 381, 73 S. W. 315.

*New Jersey*.—*Wyckoff v. Bergen*, 1 N. J. L. 214.

*New York*.—*Steward v. Biddlecum*, 2 N. Y. 106.

*Pennsylvania*.—*Weist v. Lee*, 3 Yeates 47; *Bracken v. City*, 27 Pittsb. Leg. J. 202.

*South Carolina*.—*Commissioners of Public Accounts v. Rose*, 1 Desaus. 461; *Mordecai v. Charleston County*, 8 S. C. 100; *Cauthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978.

*Tennessee*.—*Maxwell v. Owen*, 7 Cold. 630.

*Texas*.—*Cartwright v. Jones*, 13 Tex. 1.

*Virginia*.—*Branch v. Burnley*, 1 Call 147; *Wilson v. Stokes*, 4 Muf. 455.

*West Virginia*.—*Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738; *Harper v. Harvey*, 4 W. Va. 539.

<sup>9</sup> *United States*.—*Wills v. Chandler*, 2 Fed. 273, 9 Rep. 808.

*Iowa*.—*McCarver v. Nealey*, 1 G. Greene 360.

*New Jersey*.—*Wyckoff v. Bergen*, 1 N. J. L. 214.

*Pennsylvania*.—*Miller v. Preston*, 154 Pa. St. 63, 25 Atl. 1041.

*South Carolina*.—*Goldsmith's Treasurers v. McDowell*, 1 Hill L. 184, 26 Am. Dec. 166; *Mayer v. Blease*, 4 S. C. 10.

*Washington*.—*State v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L.R.A. (N.S.) 72; *Hayes v. Koepfli*, 46 Wash. 43, 89 Pac. 151.

*Wisconsin*.—*Flanders v. Sherman*, 18 Wis. 575.

<sup>10</sup> *Test v. Larsh*, 98 Ind. 301; *Mitchell v. Piqua Club Assoc.*, 15

client,<sup>11</sup> notwithstanding any private arrangements he has with his attorney.<sup>12</sup> It is immaterial that the payment was not made by the judgment debtor,<sup>13</sup> or that the judgment creditor sued in the capacity of a next friend,<sup>14</sup> or guardian *ad litem* of a minor,<sup>15</sup> or that, without the knowledge of the debtor, the judgment had been assigned before the payment was made.<sup>16</sup> Nor does the death of one of the members of a firm of lawyers revoke the authority of the survivor to receive payment of a judgment wherein the partnership represented the judgment creditor.<sup>17</sup> The satisfaction of a judgment by an attorney who is a co-owner thereof binds his interest, and satisfies the judgment to that extent.<sup>18</sup> An attorney's authority being revoked by his client's death,<sup>19</sup> he cannot thereafter satisfy the judgment unless authorized to do so by the client's representatives.<sup>20</sup> Nor will the client be bound by a satisfaction entered in fraud of his rights in pursuance of an arrangement between his attorney and the adverse party.<sup>1</sup> Satisfaction of a judgment cannot be entered by counsel who is not the attorney of record therein.<sup>2</sup> And one who pays to an attorney who has ceased to

Misc. 366, 37 N. Y. S. 406; N. Y. Code Civ. Pro. § 1280 (1).

<sup>11</sup> *State v. Hawkins*, 28 Mo. 366; *Miller v. Preston*, 154 Pa. St. 63, 25 Atl. 1041; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738; *Harper v. Harvey*, 4 W. Va. 539; *Flanders v. Sherman*, 18 Wis. 575.

*Long after the attorney's death*, a satisfaction of judgment is presumed to have been authorized by his client, and will not be stricken off on the ground of want of authority to make it. *Miller v. Preston*, 154 Pa. St. 63, 25 Atl. 1041.

<sup>12</sup> *State v. Hawkins*, 28 Mo. 366.

<sup>13</sup> *Frazier v. Parks*, 56 Ala. 363.

<sup>14</sup> *Baltimore & O. R. Co. v. Fitzpatrick*, 36 Md. 619; *Stroyd v. Pittsburgh Traction Co.*, 15 Pa. Super. Ct. 245.

<sup>15</sup> *State v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L.R.A. (N.S.) 72.

<sup>16</sup> *McCarver v. Nealey*, 1 G. Greene (Ia.) 360. See also *Hayes v. Koepfli*, 46 Wash. 43, 89 Pac. 151.

<sup>17</sup> *McGill v. McGill*, 2 Metc. (Ky.) 258.

<sup>18</sup> *Roberts v. Nelson*, 22 Mo. App. 28. See also *Beers v. Hendrickson*, 45 N. Y. 665.

<sup>19</sup> See *supra*, § 140.

<sup>20</sup> *Turnan v. Temke*, 84 Ill. 286.

<sup>1</sup> *Cage's Case*, Style (Eng.) 129; *Hunter v. Wabash R. Co.*, 149 Mo. App. 243, 130 S. W. 103; *Chambers v. Miller*, 7 Watts (Pa.) 63; *Bradford v. Arnold*, 33 Tex. 412; *Chalfants v. Martin*, 25 W. Va. 394.

As to representing conflicting interests generally, see *supra*, §§ 174-182.

<sup>2</sup> *Cameron v. Stratton*, 14 Ill. App. 270; *Test v. Larsh*, 98 Ind. 301; *Peacock v. Pembroke*, 8 Md. 348.

represent the judgment creditor does so at his own risk.<sup>3</sup> Under the New York code an attorney's authority to satisfy is limited to two years after the entry of the final judgment or order of affirmance.<sup>4</sup> The right of an attorney to satisfy a judgment which he has procured, or aided in procuring, forms an exception to the general rule, heretofore considered, that the entry of final judgment is a termination of the professional relation.<sup>5</sup> It has been held that, upon a sufficient showing, the court may restrain an attorney from collecting and satisfying a judgment on behalf of his client; in such case, however, the attorney's rights with respect to compensation, or lien therefor, will be preserved.<sup>6</sup> As in the case of other unauthorized acts, the client may ratify the unauthorized satisfaction of judgment by his attorney.<sup>7</sup>

### *Enforcement of Judgments and Decrees.*

§ 276. Issuing Execution and Receiving Payment thereon. — As a general rule, an attorney employed to prosecute a suit is authorized to do every act necessary to its final determination,<sup>8</sup> and, therefore, he may issue execution on his clients' judgments or decrees,<sup>9</sup> give indemnity which is necessary to secure the levy

<sup>3</sup> If a judgment debtor pays an attorney the amount of his claim of lien upon the judgment without the knowledge and consent of the owner of the judgment, and knowing that the attorney no longer represents such owner, the burden is upon the judgment debtor, in an action between himself and the owner of the judgment, to prove the validity of the lien and that the attorney was entitled to the money so paid thereon. *Hume v. Peterson*, 91 Neb. 347, 135 N. W. 1013.

<sup>4</sup> N. Y. Code Civ. Pro. § 1280 (1). See also *Chautauqua County Bank v. Risley*, 4 Denio (N. Y.) 480.

<sup>5</sup> See *supra*, § 142.

<sup>6</sup> *O'Neal v. Spalding*, 66 S. W. 11, 23 Ky. L. Rep. 1729.

<sup>7</sup> *Whitesell v. Peck*, 165 Pa. St. 571, 30 Atl. 933; *Wheeler v. Alderman*, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842.

As to ratification generally, see *supra*, §§ 211-214.

<sup>8</sup> *Williams v. State*, 65 Ark. 159, 46 S. W. 186; *Smith v. Cunningham*, 59 Kan. 552, 53 Pac. 760; *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

<sup>9</sup> *England*.—*Harrington v. Binns*, 3 F. & F. 942.

*United States*.—*Union Bank v. Geary*, 5 Pet. 99, 8 U. S. (L. ed.) 60; *Erwin v. Blake*, 8 Pet. 18, 8 U. S. (L. ed.) 852; *Wills v. Chandler*, 2 Fed. 273, 9 Rep. 808.

*Arkansas*.—*Conway County v. Little Rock, etc.*, R. Co., 39 Ark. 50.



thereof,<sup>10</sup> receive the money collected thereon,<sup>11</sup> and enter satisfaction thereof;<sup>12</sup> and payment so made will bind his client and discharge the officer making it, in the absence of express notice of any limitation of the attorney's authority in this respect.<sup>13</sup>

*Connecticut.*—Brckett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Derwort v. Loomer, 21 Conn. 255.

*Maryland.*—Farmers' Bank v. Mac-kall, 3 Gill 447.

*Massachusetts.*—Heard v. Lodge, 20 Pick. 53, 32 Am. Dec. 197; Parker v. Downing, 13 Mass. 465; Shattuck v. Bill, 142 Mass. 56, 7 N. E. 39.

*Michigan.*—Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

*Missouri.*—Davis v. Hall, 90 Mo. 659, 3 S. W. 382; Vaughn v. Fisher, 32 Mo. App. 29.

*New York.*—Cruikshank v. Goodwin, 66 Hun 626 mem., 20 N. Y. S. 757; Simpkins v. Page, 1 Code Rep. 107; Corning v. Southland, 3 Hill 552; Walters v. Sykes, 22 Wend. 566; Shaunessy v. Traphagen, 13 N. Y. St. Rep. 754.

*Pennsylvania.*—McDonald v. Todd, 1 Grant Cas. 17.

*South Carolina.*—Poole v. Gist, 4 McCord L. 259; Hyams v. Michel, 3 Rich. L. 303.

<sup>10</sup> Audley v. Townsend, 49 Misc. 23, 96 N. Y. S. 439. (Construing law of Wisconsin.)

<sup>11</sup> *Arkansas.*—Williams v. State, 65 Ark. 159, 46 S. W. 186.

*Georgia.*—See Lane v. Brinson, 78 S. E. 725.

*Maine.*—Gray v. Wass, 1 Greenl. 257; White v. Johnson, 67 Me. 287.

*Mississippi.*—Butler v. Jones, 7 How. 587, 40 Am. Dec. 82.

*Missouri.*—Milliken v. McBroom, 38 Mo. 342.

*Pennsylvania.*—Pearson v. Morrison, 2 Serg. & R. 20.

*South Carolina.*—Mayer v. Blease, 4 S. C. 10.

*Virginia.*—Wilson v. Stokes, 4 Munf. 455.

*An attorney has authority to receive seisin for the creditor on a levy of an execution on the debtor's land.* Pratt v. Putnam, 13 Mass. 361.

<sup>12</sup> Erwin v. Blake, 8 Pet. 25, 8 U. S. (L. ed.) 854; Taylor v. Easterling, 1 Rich. L. (S. C.) 310.

<sup>13</sup> Williams v. State, 65 Ark. 159, 46 S. W. 186; Butler v. Jones, 7 How. (Miss.) 587, 40 Am. Dec. 82. See also Henderson's Appeal, 4 Penny. (Pa.) 229.

*Fund Belonging to Several Persons.*

—In Donahue v. Frackler, 21 W. Va. 124, as to the right to pay over a fund in partition proceedings, it was said: "The attorneys would undoubtedly have had authority to receive the portions ascertained to be due their clients from the commissioners of the court; but until there had been an order made ascertaining the portion or sum due their clients, neither they nor the clients themselves by receiving the money from the purchaser could have discharged the debtor. In this case the portion coming to the several owners of the land had not been ascertained. The fund belonged to them all jointly, in different proportions, and no one of them had a right to any particular part in severalty. If, therefore, the parties had no right to demand or receive payment, *a fortiori*, their counsel could have no such power."

An attorney, though authorized, is not bound, to receive money collected for his client on execution.<sup>14</sup> And if money is paid him by the sheriff without direction as to its application he is not bound to consider it as paid on account of the sum collected on execution.<sup>15</sup> An attorney other than the attorney of record in the original suit may be employed to sue out an execution without formal substitution,<sup>16</sup> and, unless it is demanded of him, one so employed may proceed without producing his authority so to act.<sup>17</sup> So, an attorney may demand payment for his client of the proceeds of the execution.<sup>18</sup> But an attorney, by virtue of this general authority, cannot authorize an execution to issue against the property of his client while a proper supersedeas bond is on file to provide for an appeal.<sup>19</sup> Nor does an attorney's authority to receive payment give him the right to move against the sheriff, in his own name, to require the payment to him of money collected on the execution; and the fact that the attorney has a claim against his client for a larger sum than that held by the sheriff will not alter the rule.<sup>20</sup> Nor can the attorney delegate to another his authority to receive payment.<sup>1</sup> But where the attorney's fees have been paid, a direction by him to the sheriff not to pay over the money collected on the execution cannot prevail against a demand for such money by the execution plaintiff.<sup>2</sup>

§ 277. Other Measures for Enforcement. — The authority of an attorney to enforce and collect a judgment is not confined to the mere issuance of an ordinary execution for that purpose, but it extends to all other lawful means for its preservation and enforcement.<sup>3</sup> Thus an attorney may act for his client in protecting

<sup>14</sup> *Poole v. Gist*, 4 McCord L. (S. C.) 259.

<sup>15</sup> *Price v. Dearborn*, 34 N. H. 481.

<sup>16</sup> *West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730; *Thorp v. Fowler*, 5 Cow. (N. Y.) 446.

<sup>17</sup> *Chapman v. Chevis*, 9 Leigh (Va.) 297.

<sup>18</sup> *Steward v. Biddlecum*, 2 N. Y. 103; *Chapman v. Chevis*, 9 Leigh (Va.) 297.

<sup>19</sup> *State Bank v. Green*, 8 Neb. 297, 1 N. W. 210.

<sup>20</sup> *Harney v. Demoss*, 3 How. (Miss.) 174.

<sup>1</sup> *Hendry v. Benlisa*, 37 Fla. 609, 20 So. 800, 34 L.R.A. 283.

As to delegation of authority generally, see *supra*, § 210.

<sup>2</sup> *Dunn v. Newman*, 7 How. (Miss.) 582. See also *Goodrich v. Mott*, 9 Vt. 395.

<sup>3</sup> *Smith v. Cunningham*, 59 Kan.

the judgment against proceedings to avoid it.<sup>4</sup> So, he may institute supplementary proceedings,<sup>5</sup> and compel the debtor to appear and make disclosure.<sup>6</sup> The attorney of record may also, by virtue of his general retainer, institute proceedings under the fraudulent debtor's act,<sup>7</sup> or issue an alias execution,<sup>8</sup> or sue out an execution whereon the defendant may be arrested and confined in jail,<sup>9</sup> or apply for a writ of seizure and sale,<sup>10</sup> or move for an order for the sale of attached property,<sup>11</sup> or apply for the appointment of a receiver,<sup>12</sup> or present a petition in winding-up proceedings for the allowance of the judgment out of the assets of a corporation,<sup>13</sup> or indemnify the sheriff, for his clients, in order to induce him to levy.<sup>14</sup> And may sue for revival of the judgment, particularly where he has an interest therein.<sup>15</sup> But an attorney employed to procure judgment cannot, by virtue of his general authority, bring a suit on the judgment in another state, or employ another attorney to do so.<sup>16</sup> The right of an attorney to purchase at judicial or other public sales has been considered heretofore.<sup>17</sup>

**§ 278. Instructions as to Enforcement.** — The attorney who causes an execution to be issued may direct the sheriff, or other

552, 53 Pac. 760 (foreclosure proceedings).

*Appointing Appraisers.*—An attorney has not power to appoint an appraiser on execution, without special authority. *Dodge v. Prince*, 4 Vt. 191.

<sup>4</sup> *Sheldon v. Risedorph*, 23 Minn. 518.

*Compare Cullison v. Lindsay*, 108 Ia. 124, 78 N. W. 847, wherein it was held that an attorney is not authorized, on his own motion, to commence affirmative proceedings to keep alive a judgment which he has for collection.

<sup>5</sup> *Ward v. Roy*, 69 N. Y. 96; *Shau-neasy v. Traphagen*, 13 N. Y. St. Rep. 754.

<sup>6</sup> *West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730.

<sup>7</sup> *Steward v. Biddlecum*, 2 N. Y. 103.

<sup>8</sup> *Cheever v. Mirrick*, 2 N. H. 376.

<sup>9</sup> *Hyams v. Michel*, 3 Rich. L. (S. C.) 303.

<sup>10</sup> *Rowlett v. Shepherd*, 7 Mart. N. S. (La.) 515; *Simpson v. Lombas*, 14 La. Ann. 103.

<sup>11</sup> *Vaughn v. Fisher*, 32 Mo. App. 29.

<sup>12</sup> *Ward v. Roy*, 69 N. Y. 96.

<sup>13</sup> *Nelson v. Jenks*, 51 Minn. 108, 52 N. W. 1081.

<sup>14</sup> *Audley v. Townsend*, 49 Misc. 23, 96 N. Y. S. 439.

As to the right of attorney to execute bonds for his client generally, see *supra*, § 201.

<sup>15</sup> *Martinez v. Vives*, 32 La. Ann. 505.

<sup>16</sup> *Franklin v. Warden*, 9 Minn. 124.

<sup>17</sup> See *supra*, § 166.

officer in whose hands it is placed, as to the time and manner of service, and such directions will bind the client,<sup>18</sup> even though they are contrary to his instructions to the attorney.<sup>19</sup> But, while the attorney may order a departure from the usual mode of procedure in such cases,<sup>20</sup> or limit the officer to any act which is within his general authority under the writ,<sup>1</sup> he cannot authorize an abuse of process, or enlarge the officer's powers;<sup>2</sup> thus he has no implied authority to direct a levy upon the property of third persons.<sup>3</sup> Within this limitation an officer who follows the directions of the execution creditor's attorney will be protected,<sup>4</sup> even though the attorney may have acted indiscreetly, negligently, or ignorantly, or may have so abused his trust as to be answerable to his client in damages.<sup>5</sup> Thus where the attorney writes a defective return, which the officer signs, the mistake is that of the client.<sup>6</sup> In some

<sup>18</sup> *United States*.—*Rogers v. The Marshal*, 1 Wall. 644, 17 U. S. (L. ed.) 714; *Erwin v. Blake*, 8 Pet. 18, 8 U. S. (L. ed.) 852.

*Alabama*.—*Smith v. Gayle*, 58 Ala. 600.

*Indiana*.—*State v. Boyd*, 63 Ind. 428.

*New York*.—*Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Corning v. Southland*, 3 Hill 552.

*Pennsylvania*.—*Lynch v. Com.*, 16 Serg. & R. 368, 16 Am. Dec. 582.

*Vermont*.—*Kimball v. Perry*, 15 Vt. 414; *Willard v. Goodrich*, 31 Vt. 597.

<sup>19</sup> *Russell v. Geyer*, 4 Mo. 384.

<sup>20</sup> *McClure v. Colclough*, 5 Ala. 65; *State v. Boyd*, 63 Ind. 428.

<sup>1</sup> *Godfrey v. Gibbons*, 22 Wend. (N. Y.) 569.

<sup>2</sup> *Walters v. Sykes*, 22 Wend. (N. Y.) 566.

<sup>3</sup> *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027.

An attorney has no implied authority to direct that an execution, which

he has obtained in favor of his client, be levied upon property belonging to a third person. *Parker v. Home Mut. Building & Loan Assoc.*, 114 Ga. 702, 40 S. E. 724. See also *Donahue v. Frackler*, 21 W. Va. 124.

If, therefore, an officer to whom a warrant is issued directing him to seize the goods of A, takes the goods of B, an authority so to do from the principal in the proceedings will not be implied, and without other evidence he cannot be made liable by the presence of his attorney at the time of the seizure, or by the directions of said attorney to the officer. *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519. See also *Fisher v. Hetherington*, 11 Misc. 575, 32 N. Y. S. 795.

<sup>4</sup> *McClure v. Colough*, 5 Ala. 65; *White v. Johnson*, 67 Me. 287; *Howard v. Whittemore*, 9 N. H. 133.

<sup>5</sup> *Jenney v. Delesdernier*, 20 Me. 183.

<sup>6</sup> *Stevens v. Colby*, 46 N. H. 163.

states, however, the courts adhere to the rule, heretofore discussed, to the effect that the rendition of final judgment puts an end to the attorney's authority,<sup>7</sup> and, therefore, that he cannot, by directing the manner of sale upon execution, waive any of his client's substantial rights.<sup>8</sup>

**§ 279. Agreements in Connection with Enforcement. —**

It has been held that an attorney, authorized to enforce a judgment, is impliedly clothed with authority to take all necessary steps and make all necessary contracts to accomplish such enforcement for the best interests of his client.<sup>9</sup> Thus counsel may agree that if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the appellate court,<sup>10</sup> or that attached property of a perishable nature may be sold and the proceeds thereof paid into court,<sup>11</sup> or that a commissioner's report of a sale of trust property may be confirmed,<sup>12</sup> or to withdraw an appeal in consideration of the suspension, by the other party, of a decreed sale.<sup>13</sup> Where an attorney in an action on a promissory note against the administratrix of an indorser, agreed with her that, if she would confess judgment, he would immediately take out execution, and collect the judgment from the maker of the note, who, he assured her, was then of sufficient property, it was held that such agreement was within the scope of the general authority of the attorney, and binding on his client.<sup>14</sup> But an attorney employed to defend a suit is not thereby clothed with any implied power of disposition over his client's property, whether in satisfaction of the judgment, or in payment of the expenses of the suit, or for any other purpose; nor is he held out to the adverse party as clothed with any such power; and it can make no difference whether the property disposed of is the subject-matter

<sup>7</sup> See *supra*, § 142.

<sup>8</sup> *Person v. Leathers*, 67 Miss. 548,

7 So. 391.

<sup>9</sup> *Fowler v. Iowa Land Co.*, 18 S. D.

131, 99 N. W. 1095.

<sup>10</sup> *Halliday v. Stuart*, 151 U. S. 229,

14 S. Ct. 302, 38 U. S. (L. ed.) 141.

<sup>11</sup> *Nelson v. Cook*, 19 Ill. 440. See

also *Rice v. O'Keefe*, 6 Heisk. (Tenn.) 638.

<sup>12</sup> *Story v. Hawkins*, 8 Dana (Ky.)

12.

<sup>13</sup> *Ward v. Hollins*, 14 Md. 158.

<sup>14</sup> *Union Bank v. Geary*, 5 Pet. 98, 8 U. S. (L. ed.) 60.

of the litigation, or not.<sup>15</sup> Nor has an attorney any implied authority to bind his client by an agreement that the purchaser at a judicial sale shall pay the amount of his bid to a third person instead of to the officer making the sale.<sup>16</sup> The general right of an attorney to make or alter contracts on behalf of his client has been considered heretofore.<sup>17</sup>

§ 280. *Staying Execution.* — The implied power of an attorney to stay an execution, issued in favor of his client, is recognized in several jurisdictions.<sup>18</sup> This is in accordance with the general practice of attorneys, and they ought not to be held responsible except for fraud or gross negligence, or proof that their clients have suffered a loss by the indulgence granted.<sup>19</sup> Thus it has been held that it is within the power of an attorney to stay execution in consideration of the promise of a third person to pay the debt,<sup>20</sup> or to agree on behalf of his client (the plaintiff) that if the defendant will submit to a default, no execution shall issue for the period of one week, or, if issued, that it shall not be served within that time.<sup>1</sup> So, where an execution has been issued on a judgment which was fraudulently entered, the plaintiff's attorney has authority to agree that it shall be postponed to a subsequent execution.<sup>2</sup> It is advisable, of course, to submit the matter to the client when this can be done, or, if obliged to act hurriedly, to inform him of

<sup>15</sup> *National Bank of Commerce v. Bowman*, 100 S. W. 831, 30 Ky. L. Rep. 1236; *Kronschnable v. Knoblauch*, 21 Minn. 56.

As to the disposition of the client's property generally, see *supra*, § 203.

*Compare* *Reamer's Appeal*, 18 Pa. St. 510, wherein it was held that counsel for execution creditors have authority to agree with the sheriff that certain persons may take possession of the goods levied on, and sell the same, adjourning from day to day, and that as to such goods, the sheriff shall be responsible only for the proceeds received from such persons.

<sup>16</sup> *Philadelphia Fire Assoc. v. Ruby*, 58 Neb. 730, 79 N. W. 723.

<sup>17</sup> See *supra*, § 202.

<sup>18</sup> *Albertson v. Goldsby*, 28 Ala. 711, 65 Am. Dec. 380; *Cline v. Wrightson*, 7 Ky. L. Rep. 230 (abstract); *Kent v. Ricards*, 3 Md. Ch. 392; *Silvis v. Ely*, 3 Watts & S. (Pa.) 420; *Lynch v. Com.*, 16 S. & R. (Pa.) 368, 16 Am. Dec. 582.

<sup>19</sup> *Millaudon v. McMicken*, 7 Mart. N. S. (La.) 34.

<sup>20</sup> *Silvis v. Ely*, 3 Watts & S. (Pa.) 420.

<sup>1</sup> *Wieland v. White*, 109 Mass. 392.

<sup>2</sup> *Read v. French*, 28 N. Y. 285.

the stay at the earliest opportunity.<sup>3</sup> In some states, however, it has been held that an execution cannot be stayed by the attorney unless he has been so authorized by the execution creditor,<sup>4</sup> and that special authority to do so will not be presumed from a return by the officer that the execution was suspended by the attorney.<sup>5</sup>

*Proceedings for Review.*

§ 281. Authority to Prosecute Appeal and Error.— In accordance with the view, heretofore considered, that the authority of the attorney of record ends with the entry of final judgment,<sup>6</sup> it has been quite generally held that he cannot, merely by virtue of his original retainer, prosecute an appeal or writ of error in the name of his former client;<sup>7</sup> nor will such procedure be

<sup>3</sup> In *Silvis v. Ely*, 3 Watts & S. (Pa.) 420, it was said: "An attorney has power to stay proceedings, either before suit or after judgment, unless restrained by special instructions. An agreement to stay the proceedings would be a consideration for a promise by a third person, and the principal would be bound by such a contract, if entered into in good faith. And who can doubt that such an agreement would bind the principal, if he did not express his dissent in a reasonable time. Although he was not informed of the agreement in the case at bar, and of course neither assented nor dissented, yet by commencing the suit he ratifies the act of the attorney, and, as between them, he is bound, unless the attorney acted in bad faith. In this extended country, knit together by commercial ties and constant intercourse, and where large debts are constantly contracting and owing by one section to another, we must beware of setting too limited bounds to the salutary

discretion of attorneys. It is in the power of the principal to limit the authority of the attorney, as between themselves, without difficulty; and we may safely trust to their vigilance in seeking out those who are most fit, from their knowledge and honesty, to be intrusted with the transaction of business. The delay of a day may sometimes be fatal to the claim; and as the client most frequently lives at a distance, it may be impossible in time to communicate with him. It is most prudent, when it can be done, to avoid taking any step out of the usual course of business, without the assent of the principal; but this is a matter of sound discretion, with which third persons have little, if anything, to do."

<sup>4</sup> *Reynolds v. Ingersoll*, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; *Pendexter v. Vernon*, 9 Humph. (Tenn.) 84.

<sup>5</sup> *Reynolds v. Ingersoll*, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57.

<sup>6</sup> See *supra*, § 142.

<sup>7</sup> *Colorado*.—*Tobles v. Nevitt*, 45

warranted, as against the client's objection, by the fact that the attorney has a disputed agreement with his client, which, if established, would entitle him to share in the recovery.<sup>8</sup> But in several states the implied authority of an attorney to prosecute an appeal or writ of error is recognized.<sup>9</sup> So, also, an exception to the general rule exists in favor of municipal solicitors elected by the people to conduct litigation for them; such attorneys may not only appeal on behalf of their clients, but it is highly proper that they do so should they deem it advisable.<sup>10</sup> Under the Louisiana statute, the duties of an attorney *ad hoc* for an absentee do not terminate with the conclusion of the suit in the lower court, and it is incumbent upon him to appeal, if, in his opinion, his client can be benefited thereby.<sup>11</sup> Where proceedings for review have been taken by an attorney, his authority so to proceed will be presumed in the absence of an objection by his client,<sup>12</sup> excepting where such client is

Colo. 231, 16 Ann. Cas. 925, 100 Pac. 416, 132 Am. St. Rep. 142, 23 L.R.A. (N.S.) 702.

*Illinois*.—Covill v. Phy, 24 Ill. 37.

*Iowa*.—Hopkins v. Mallard, 1 G. Greene 117.

*Kentucky*.—Hey v. Simon, 93 S. W. 50, 29 Ky. L. Rep. 315.

*Louisiana*.—Ikerd v. Borland, 35 La. Ann. 337; Gibson v. Hitchcock, 35 La. Ann. 1201.

*Maryland*.—National Park Bank v. Lanahan, 60 Md. 477.

*New Jersey*.—Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265.

*Tennessee*.—Coles v. Anderson, 8 Humph. 489. Compare Foster v. Blount, 1 Overt. 343.

*Wisconsin*.—Hooker v. Brandon, 75 Wis. 8, 43 N. W. 741.

<sup>8</sup> Delaney v. Husband, 64 N. J. L. 275, 45 Atl. 265.

<sup>9</sup> *Georgia*.—Civ. Code (1911), §§ 4955, 5002; Friar v. Curry, 119 Ga. 908, 47 S. E. 206. See also Nisbet v. Lawson, 1 Ga. 275. Compare Commissioners of Roads for 505th Dist.

v. Griffin & W. P. Plank-Road Co., 9 Ga. 491.

*Massachusetts*.—Adams v. Robinson, 1 Pick. 461; Grosvenor v. Danforth, 16 Mass. 74.

*Michigan*.—See Norberg v. Heineman, 59 Mich. 210, 26 N. W. 481.

*New Hampshire*.—See Spaulding's Appeal, 33 N. H. 479.

*Texas*.—See Thompson v. House, 23 Tex. 178.

<sup>10</sup> Connett v. Chicago, 114 Ill. 237, 29 N. E. 280.

<sup>11</sup> Bach v. Ballard, 13 La. Ann. 487.

<sup>12</sup> *Alabama*.—Riddle v. Hanna, 25 Ala. 484.

*California*.—Ricketson v. Torres, 23 Cal. 636; Woodmen of the World v. Rutledge, 133 Cal. 640, 65 Pac. 1105.

*Michigan*.—Norberg v. Heineman, 59 Mich. 210, 26 N. W. 481.

*Missouri*.—Ring v. Charles Vogel Paint & Glass Co., 46 Mo. App. 374.

*Ohio*.—Kefauver v. Batdorf, 24 Ohio Cir. Ct. Rep. 664.



a minor, or other person under a like disability.<sup>18</sup>

§ 282. **Control of Proceedings.** — An appeal or writ of error having been taken, proceedings thereon are within the control of the attorney of record<sup>14</sup> as effectually as are all other proceedings during the pendency of the litigation;<sup>15</sup> and the lawful stipulations entered into by such attorneys cannot be disregarded.<sup>16</sup> Thus counsel for the respective parties on appeal may stipulate that the cause shall be argued before one judge, where the others are disqualified, and that his decision shall be entered up as the judgment of the court.<sup>17</sup> So, an attorney, by virtue of his general authority, may, after judgment has been entered, allow an extension of time in which to perfect an appeal.<sup>18</sup> An agreement by an attorney to withdraw an appeal must, in the absence of proof to the contrary, be presumed to be made by the client's authority.<sup>19</sup> But where an attorney prosecuting an action on behalf of a school district refused to dismiss an appeal at the request of the directors who had authority to control the action, a motion by the directors to dismiss, though informal, was allowed.<sup>20</sup> The stipulations entered into by the attorneys for the respective parties must, of course, conform to the prevailing practice, whether established by statute or rule of court.<sup>1</sup> But one who agrees that certain formalities may be dispensed with in the preparation of the case for review, will not thereafter be heard to complain of their ab-

*Texas.*—*Thompson v. House*, 23 Tex. 178.

<sup>13</sup> *Riddle v. Hanna*, 25 Ala. 484.

<sup>14</sup> *Grand Court of Colanthe v. Downs*, 98 Miss. 740, 53 So. 417; *State v. Kitchen*, 41 N. J. L. 229; *Rogan v. Walker*, 1 Wis. 597. See also *Bourbon Stock-Yards Co. v. Louisville*, 63 S. W. 285, 23 Ky. L. Rep. 420.

<sup>15</sup> See *supra*, § 246 et seq.

<sup>16</sup> *State v. Kitchen*, 41 N. J. L. 229.

<sup>17</sup> *Rogan v. Walker*, 1 Wis. 597.

<sup>18</sup> *Hoffenberth v. Muller*, 12 Abb. Pr. N. S. (N. Y.) 221.

<sup>19</sup> *Ward v. Hollins*, 14 Md. 158.

<sup>20</sup> *School Dist. No. 116 v. School Dist. No. 141*, 79 Kan. 407, 99 Pac. 620, wherein it was said: "If the effect upon the rights of the school district were reasonably in doubt, we should hesitate to recognize the informal procedure. . . . It is a matter of great public concern to both school districts involved in this action that fruitless litigation between them should not be protracted."

<sup>1</sup> *Louisville, N. A., etc., R. Co. v. Boland*, 70 Ind. 595; *Pendleton v. Pendleton*, 1 Thomp. & C. (N. Y.) 95.

sence, and it has been held that he will be enjoined from taking advantage thereof,<sup>3</sup> no fraud or collusion being shown.<sup>3</sup>

§ 283. **Waiving Right of Review.**—The general rule is that an attorney has implied authority to waive his client's right to prosecute an appeal or writ of error,<sup>4</sup> especially where such waiver is based on a sufficient consideration.<sup>5</sup> This ruling is predicated on the theory that while it is the duty of an attorney to act with the utmost good faith to his client, it is not his duty to prosecute an appeal which he believes to be hopeless or unnecessary.<sup>6</sup> The waiver should be expressed in writing and made part of the record in the cause.<sup>7</sup> On the other hand, it has been held that an attorney cannot waive his client's rights in this respect.<sup>8</sup> In case of fraud or mistake, the court has the power to relieve a party from the effects of such an agreement,<sup>9</sup> especially where the attorney is unable to respond in damages.<sup>10</sup>

<sup>2</sup> *Memphis Consol., etc., Co. v. Simpson*, 118 Tenn. 532, 103 S. W. 788.

<sup>3</sup> *Grand Court of Colanthe v. Downs*, 98 Miss. 740, 53 So. 417.

<sup>4</sup> *Illinois*.—*Leahy v. Stone*, 115 Ill. App. 138.

*Iowa*.—*Matter of Heath*, 83 Ia. 215, 48 N. W. 1037.

*Maryland*.—*Mackey v. Daniel*, 59 Md. 484.

*New Hampshire*.—*Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468.

*Washington*.—*Jones v. Spokane Valley Land & Water Co.*, 44 Wash. 146, 87 Pac. 65.

<sup>5</sup> *Mackey v. Daniel*, 59 Md. 484.

A *gratuitous waiver* of the right of appeal is ineffective. *Keoughan v. Equitable Oil Co.*, 116 La. 773, 41 So. 88; *Jones v. Spokane Valley Land & Water Co.*, 44 Wash. 146, 87 Pac. 65.

<sup>6</sup> *In re Heath*, 83 Ia. 215, 48 N. W. 1037.

<sup>7</sup> *Jones v. Spokane Valley Land & Water Co.*, 44 Wash. 146, 87 Pac. 65.

<sup>8</sup> *People v. New York*, 11 Abb. Pr. (N. Y.) 66. See also *Merriman v. Peck*, 96 Mich. 603, 55 N. W. 1021, wherein it was said that where an appellant employs an attorney in regular standing, and does all that is required by the advice of his attorney to perfect an appeal, he ought not to lose his right thereto, where justice requires a revision of the case, through the neglect or oversight of the attorney.

An attorney *ad litem* has no power to bind his client not to appeal by making an agreement to that effect with the opposing attorney. *La Société Canadienne-Francaise, etc., v. Daveluy*, 20 Can. Sup. Ct. 449.

<sup>9</sup> *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468.

<sup>10</sup> *People v. New York*, 11 Abb. Pr. (N. Y.) 66.

## CHAPTER XIV.

### LIABILITY GENERALLY.

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*For Breach of Duty.*

**§ 284. In General.** — The relation of attorney and client is one of the highest trust and confidence, and requires the attorney to observe the utmost good faith toward his client,<sup>1</sup> and to use due care, skill and diligence in the performance of his professional duties.<sup>2</sup> He owes to his client not only all the industry and application of which he is capable, but also unshaken fidelity.<sup>3</sup> Thus an attorney cannot represent conflicting interests,<sup>4</sup> nor acquire interests adverse to those of his client.<sup>5</sup> But this duty extends no further; thus it will not justify an attempt to evade the fair operation of the law, or to impede the administration of justice.<sup>6</sup> It would be deplorable, indeed, if a lawyer felt that he was under an obligation to his client to maintain positions which did not accord with his own notions of law and justice, simply because they tended to his client's advantage. The lawyer owes a duty to the court, to himself, and to society, as well as to his client, which he is equally bound to observe.<sup>7</sup> Dealings between attorney and client generally have been considered heretofore.<sup>8</sup>

**§ 285. By Fraudulent Conduct.** — As to what shall constitute a fraud upon the client by his attorney, it will be necessary to consult the general subject of dealings between attorney and client, the acquisition of adverse interests, and the representation of

<sup>1</sup> Ex p. Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *In re Egan*, 22 S. D. 355, 117 N. W. 874. See also *Asher v. Beckner*, 41 S. W. 35, 19 Ky. L. Rep. 521.

<sup>2</sup> See *infra*, §§ 312-330.

<sup>3</sup> *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *National Hollow Brake*

*Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561.

<sup>4</sup> See *supra*, §§ 174-182.

<sup>5</sup> See *supra*, §§ 164-173.

<sup>6</sup> Ex p. Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388.

<sup>7</sup> *Sprague v. Moore*, 136 Mich. 426, 99 N. W. 377.

<sup>8</sup> See *supra*, §§ 152-163.

those whose interests conflict, which have been already considered.<sup>9</sup> As a general rule, it may be said that an attorney is liable to his client for any loss sustained by the latter in consequence of the attorney's fraud,<sup>10</sup> as, for instance, where he takes an improper advantage of his client,<sup>11</sup> by concealing information,<sup>12</sup> or by false representations of fact,<sup>13</sup> or as to the law,<sup>14</sup> or by representing conflicting interests,<sup>15</sup> or acquiring interests adverse to those of his client.<sup>16</sup> The fraud must, of course, be established.<sup>17</sup>

**§ 286. In Reference to Papers of Client.** — Where a client intrusts important papers to his attorney, the latter should not only return them when the relation of attorney and client ceases, but should not wilfully do anything by which another can gain information concerning such papers; and the fact that the client, without cause, discharges the attorney without paying him and employs another, does not alter the case, though it may give the attorney a right to retain such papers by virtue of his lien.<sup>18</sup> But an attor-

<sup>9</sup> See *supra*, §§ 152-182.

<sup>10</sup> *McLead v. Applegate*, 127 Ind. 349, 26 N. E. 830; *Hoopes v. Burnett*, 26 Miss. 428; *Loeff v. Lawton*, 97 N. Y. 478; *Heilbronner v. Douglass*, 32 Tex. 215; *Porter v. Kruegel*, (Tex.) 155 S. W. 174; *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410. See also *Krause v. Lloyd*, 100 Iowa 666, 69 N. W. 1062. And see *supra*, § 156.

<sup>11</sup> *Reigal v. Wood*, 1 Johns. Ch. (N. Y.) 402. And see *supra*, §§ 152-163.

<sup>12</sup> *Baker v. Humphrey*, 101 U. S. 494, 25 U. S. (L. ed.) 1065; *L'Amoureux v. Vandenburg*, 7 Paige (N. Y.) 316, 32 Am. Dec. 635. See also *supra*, § 155.

<sup>13</sup> *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 457; *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74; *Hazelrigg v. Brenton*, 2 Duv. (Ky.) 525; *Wheaton v. Newcombe*, 48 Super. Ct. (N. Y.) 215; *Allen v. Frawley*, 106 Wis. 638, 82 N. W. 593.

<sup>14</sup> *Hubbard v. McLean*, 115 Wis. 9, 90 N. W. 1077.

<sup>15</sup> See *supra*, §§ 174-182.

<sup>16</sup> *Hooker v. Axford*, 33 Mich. 453; *Taylor v. Young*, 56 Mich. 285, 22 N. W. 799. And see *supra*, §§ 164-173.

<sup>17</sup> Fraud did not exist in the following cases: *Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 U. S. (L. ed.) 592. *Phillips v. Rhodes*, 2 Colo. App. 70, 29 Pac. 1011; *Bachman v. Goldmark*, 48 Super. Ct. (N. Y.) 549; *Dewitt v. Herron*, 39 Tex. 675.

<sup>18</sup> *In re Hahn*, 11 Abb. N. Cas. (N. Y.) 423. See also *In re Wheatcroft*, 6 Ch. D. (Eng.) 97, 26 W. R. 69, 46 L. J. Ch. 669; *Howard v. Gunn*, 32 Beav. (Eng.) 462; *In re Thomson*, 20 Beav. (Eng.) 545, 1 Jur. N. S. 718; *Robertson v. Clocke*, 18 App. Div. 363, 46 N. Y. S. 87.

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ney whose office has been broken open, and papers stolen therefrom, without negligence on his part, is not liable for the loss.<sup>19</sup>

§ 287. **Release of Liability.** — The client may, of course, release his attorney from all liability in the performance of his professional duties. In such case, however, the strict rules, heretofore considered, in connection with dealings between attorney and client, will apply;<sup>20</sup> and it must be clearly shown that the giving of such release was free from fraud, influence, or mistake, and that the client was fairly acquainted with all the material facts and circumstances.<sup>1</sup>

#### *For Unauthorized Acts.*

§ 288. **Generally.** — The principles stated heretofore in discussing the scope of an attorney's general authority,<sup>2</sup> and also his authority to appear for litigants,<sup>3</sup> and conduct their litigation,<sup>4</sup> should be consulted here for such aid as they may afford in determining the implied authority of counsel. When an attorney undertakes, without his client's consent, to step outside the bounds of his implied authority, he does so at his own risk, and is responsible to the client for any injury sustained by reason of such unauthorized act;<sup>5</sup> and, in the performance of a task so undertaken, he will be held to the same strictness in the manner of its discharge

*Papers.*—A person is not entitled to the possession of notes placed in the hands of an attorney for collection where an interest in the notes is held by others, and he does not show their consent to such possession, nor offer to indemnify them. *Bougher v. Scobey*, 23 Ind. 583.

*The minutes of testimony* taken by a counsel upon the trial of an action in which he is retained belong to himself, and not to his client. *Anonymous*, 31 Me. 590.

<sup>19</sup> *Hill v. Barney*, 18 N. H. 607.

<sup>20</sup> See *supra*, §§ 152-163.

<sup>1</sup> *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. S. 873.

*A release of all liability* executed by the client, in the absence of fraud, is a good defense. *Derrickson v. Cady*, 7 Pa. St. 27. See also *Hamsher v. Kline*, 57 Pa. St. 397.

<sup>2</sup> See *supra*, §§ 199-214.

<sup>3</sup> See *supra*, §§ 229-245.

<sup>4</sup> See *supra*, §§ 246-283.

<sup>5</sup> *Jones v. Wolcott*, 2 Allen (Mass.) 247; *Coopwood v. Baldwin*, 25 Miss. 129. See also *Fitch v. Scott*, 3 How. (Miss.) 319, 34 Am. Dec. 86; *Armstrong v. Craig*, 18 Barb. (N. Y.) 387; *Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431.

as if it were within the terms of his contract.<sup>6</sup> The liability of an attorney to third persons injured by his unauthorized conduct will be considered later.<sup>7</sup>

**§ 289. As Dependent on Instructions.**—It is, of course, the duty of an attorney to advise his client to the best of his judgment and ability,<sup>8</sup> but the client is not bound to follow the advice so given; and where the attorney has been instructed by his client, and such instructions do not conflict with the attorney's duty as an officer of the court, it is safer for counsel to follow the client's instructions so far as the rules of law will permit,<sup>9</sup> for, should damage result to his client in consequence of his failure to do so, the attorney's liability is plain.<sup>10</sup> But a client has no right to control his attorney in the due and orderly conduct of a suit.<sup>11</sup> The failure to follow instructions in the collection of claims has been considered elsewhere.<sup>12</sup>

**§ 290. Unauthorized Appearance.**—An attorney must respond in damages for any loss sustained in consequence of his unauthorized appearance.<sup>13</sup> In the absence of substantial injury,

<sup>6</sup> Spangler v. Sellers, 5 Fed. 882.

<sup>7</sup> See *infra*, §§ 295-302.

<sup>8</sup> Nave v. Baird, 12 Ind. 318. And see also § 155.

<sup>9</sup> Nave v. Baird, 12 Ind. 318; Lord v. Hamilton, 34 Ore. 443, 56 Pac. 525; Harris's Appeal, (Pa.) 6 Atl. 761.

*It is a fair presumption* that an attorney acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred. Holmes v. Peck, 1 R. I. 242.

<sup>10</sup> O'Halloran v. Marshall, 8 Ind. App. 394, 35 N. E. 926; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Armstrong v. Craig, 18 Barb. (N. Y.) 387; Fox v. Jones, 4 Tex. App. Civ. Cas. § 29, 14 S. W. 1007.

*Lawyer as Client.*—Where the acquiescence of a client, who is a lawyer,

is the result of a personal examination of the authorities and his individual knowledge and superior skill as a lawyer, he is estopped to plead the negligence of his attorney. Carr v. Glover, 70 Mo. App. 242.

<sup>11</sup> Anonymous, 1 Wend. (N. Y.) 108. See also *supra*, §§ 246-249.

<sup>12</sup> See *supra*, § 203 et seq.

<sup>13</sup> *England.*—Bayley v. Buckland, 1 Exch. 1, 11 Jur. 564, 5 Dowl. & L. 115; Hambridge v. De La Crouée, 3 C. B. 742, 54 E. C. L. 742.

*United States.*—Shelton v. Tiffin, 6 How. 163, 12 U. S. (L. ed.) 387; Field v. Gibbs, Pet. (C. C.) 155, 9 Fed. Cas. No. 4,766; Robb v. Vos, 155 U. S. 13, 15 S. Ct. 4, 39 U. S. (L. ed.) 52.

*Alabama.*—Wheeler v. Bullard, 6 Port. 352.

however, the recovery must be nominal.<sup>14</sup> The right to appear for litigants generally, unauthorized appearances, objection thereto, and the effect thereof, have been considered heretofore.<sup>15</sup> Injuries to third persons because of an unauthorized appearance will be considered later.<sup>16</sup>

§ 291. Unauthorized Compromise or Release. — It has been stated elsewhere<sup>17</sup> that, in the absence of express authority

*Arkansas*.—Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

*Iowa*.—Piggott *v.* Addicks, 3 G. Greene 427, 56 Am. Dec. 547; Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

*Kansas*.—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

*Kentucky*.—Atkinson *v.* Howlett, 11 Ky. L. Rep. 364.

*Louisiana*.—Walworth *v.* Henderson, 9 La. Ann. 339; Marvel *v.* Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424.

*Maryland*.—Munnikuyson *v.* Dorsett, 2 Har. & G. 374; Fowler *v.* Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

*Massachusetts*.—Jones *v.* Wolcott, 2 Allen 247; Smith *v.* Bowditch, 7 Pick. 137.

*Michigan*.—Arno *v.* Wayne Circuit Judge, 42 Mich. 362, 4 N. W. 147.

*Mississippi*.—Schirling *v.* Scites, 41 Miss. 644.

*New Hampshire*.—Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth *v.* Balch, 40 N. H. 363.

*New Jersey*.—Hendrickson *v.* Hendrickson, 15 N. J. L. 102; Ward *v.* Price, 25 N. J. L. 225.

*New York*.—Allen *v.* Stone, 10 Barb. 547; Armstrong *v.* Craig, 18 Barb. 387; Ellsworth *v.* Campbell, 31 Barb. 134; Chatham Bank *v.* Hochstadter, 11 Daly 343; Bogardus *v.*

Livingston, 2 Hilt. 236; Williams *v.* Van Valkenburg, 16 How. Pr. 144; O'Hara *v.* Brophy, 24 How. Pr. 379; Jackson *v.* Stewart, 6 Johns. 34; Denton *v.* Noyes, 6 Johns. 296, 5 Am. Dec. 237; People *v.* Bradt, 7 Johns. 539; American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561; Grazebrook *v.* McCreddie, 9 Wend. 437; Adams *v.* Gilbert, 9 Wend. 499; Ingalls *v.* Sprague, 10 Wend. 672; Powers *v.* Trenor, 3 Hun 3, 5 Thomp. & C. 231; Watrous *v.* Kearney, 11 Hun 584; Post *v.* Charlesworth, 66 Hun 256, 21 N. Y. S. 168; Runberg *v.* Johnson, 11 Civ. Proc. 283, 5 N. Y. St. Rep. 800; Brown *v.* Nichols, 9 Abb. Pr. N. S. 1; Brown *v.* Nichols, 42 N. Y. 26; Sperry *v.* Reynolds, 65 N. Y. 179; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Chatfield *v.* Simonson, 92 N. Y. 209.

*Pennsylvania*.—Cyphert *v.* McClune, 22 Pa. St. 195.

*Vermont*.—Coit *v.* Sheldon, 1 Tyler 300; Spaulding *v.* Swift, 18 Vt. 214; Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394.

*Wisconsin*.—Cleveland *v.* Hopkins, 55 Wis. 387, 13 N. W. 225.

<sup>14</sup> Harrington *v.* Huntley, 4 Alb. L. J. 367.

<sup>15</sup> See *supra*, §§ 229-245.

<sup>16</sup> See *infra*, § 295 et seq.

<sup>17</sup> See *supra*, §§ 215-228.



from his client, an attorney cannot compromise or release the client's claims or demands; thus he cannot settle for less than the amount due, nor accept anything other than money, in payment thereof; and, therefore, an attorney guilty of a breach of duty in this respect must answer for any loss which his client may sustain in consequence of his unauthorized act.<sup>18</sup> In this connection it must be remembered that, in the event of an emergency imperatively demanding the exercise of authority to compromise, the attorney may use a just and reasonable discretion, and is not liable if he acts in good faith, and with reasonable skill, care, and diligence.<sup>19</sup> So, the unauthorized act may be ratified by the client and thus rendered effective.<sup>20</sup> Thus where an attorney, holding an account for collection, compromises with the debtor, and his client makes no objection thereto, but does object to the fee charged by the attorney, the latter cannot return the money to the debtor without the client's authority, and he will be liable for so doing.<sup>1</sup>

*For Acts of Partners, Substitutes, Clerks and Assistants.*

§ 292. **Acts of Partners.** — It has been stated heretofore that the employment of a firm of lawyers, even though only one of them has been consulted, is equivalent to the retainer of each of the partners.<sup>2</sup> Therefore, the firm is responsible for the acts of its individual members within the scope of their authority,<sup>3</sup> even though

<sup>18</sup> *Alabama*.—Cameron v. Clarke, 11 Ala. 259; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

*Illinois*.—People v. Cole, 84 Ill. 327.

*Indiana*.—Repp v. Wiles, 3 Ind. App. 167, 29 N. E. 441.

*Louisiana*.—Woodrow v. Hennen, 6 Mart. N. S. 157.

*Massachusetts*.—Wilson v. Coffin, 2 Cush. 316.

*Mississippi*.—Lombard v. Whiting, 1 Walk. 229; Fitch v. Scott, 3 How. 314, 34 Am. Dec. 86; Coopwood v. Baldwin, 25 Miss. 129.

*Missouri*.—Houx v. Russell, 10 Mo. 246.

*New York*.—Carstens v. Barnstorf, 11 Abb. Pr. N. S. 442.

*North Dakota*.—Riegi v. Phelps, 4 N. D. 272, 60 N. W. 402.

*Ohio*.—Christy v. Douglas, Wright 485.

<sup>19</sup> Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63. And see *supra*, § 218.

<sup>20</sup> See *supra*, §§ 211-214.

<sup>1</sup> Nathan v. Halsell, 91 Miss. 785, 45 So. 856.

<sup>2</sup> See *supra*, § 184. See also Marsh v. Gold, 2 Pick. (Mass.) 285; Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98.

<sup>3</sup> Richardson v. Richardson, 100

they act negligently,<sup>4</sup> unauthorizedly,<sup>5</sup> or fraudulently.<sup>6</sup> So the firm is responsible for claims placed in its care for collection,<sup>7</sup> irrespective of the fact that one of the members thereof did not participate in the transaction.<sup>8</sup> Payment to one of the partners is payment to all,<sup>9</sup> though made after the dissolution of the firm.<sup>10</sup> But the firm is not liable for the acts of one of its members outside the

Mich. 364, 59 N. W. 178; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98; *Warner v. Griswold*, 8 Wend. (N. Y.) 665.

<sup>4</sup> *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968; *Warner v. Griswold*, 8 Wend. (N. Y.) 665.

<sup>5</sup> *Gordon v. Coolidge*, 1 Sumn. 537, 10 Fed. Cas. No. 5,606.

<sup>6</sup> *Blair v. Bromley*, 11 Jur. (Eng.) 617, 16 L. J. Ch. 495.

<sup>7</sup> *Illinois*.—*Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202.

*Indiana*.—*Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, rehearing denied 39 Ind. App. 420, 79 N. E. 523.

*Kentucky*.—*McGill v. McGill*, 2 Metc. 258.

*Louisiana*.—*Dwight v. Simon*, 4 La. Ann. 490.

*Tennessee*.—*Porter v. Vance*, 14 Lea 630.

*Wisconsin*.—*Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

<sup>8</sup> *Dwight v. Simon*, 4 La. Ann. 490; *Porter v. Vance*, 14 Lea (Tenn.) 629.

Where one member of a firm furnishes security for his client's attachment, and receives money from his client to indemnify the surety, he acts within his authority, and the other members of the firm are liable to the client for the money so deposited, though they had no knowledge of the fact and though the partner receiving it never accounted for it as a firm asset. *Fornes v. Wright*, 91 Iowa 392, 59 N. W. 51.

<sup>9</sup> *England*.—*Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61; *Dundonald v. Masterman*, L. R. 7 Eq. 504, 38 L. J. Ch. 350, 17 W. R. 548.

*Alabama*.—*Cook v. Bloodgood*, 7 Ala. 683.

*Indiana*.—*Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, rehearing denied 39 Ind. App. 420, 79 N. E. 523.

*Kansas*.—*Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264.

*Kentucky*.—*McGill v. McGill*, 2 Metc. 258.

*Louisiana*.—*Dwight v. Simon*, 4 La. Ann. 490.

*Michigan*.—*Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178.

*Mississippi*.—*Wilkinson v. Griswold*, 12 Smedes & M. 669.

*Missouri*.—*Bryant v. Hawkins*, 47 Mo. 410; *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968.

*New York*.—*McFarland v. Crary*, 8 Cow. 259.

<sup>10</sup> *Smyth v. Harvie*, 31 Ill. 62, 83 Am. Dec. 202; *Bryant v. Hawkins*, 47 Mo. 410; *Poole v. Gist*, 4 McCord L.

But see *Ayrault v. Chamberlin*, 26 Barb. (N. Y.) 83, wherein it was held that where a partnership between attorneys is dissolved after they have commenced a suit to foreclose a mortgage, and a new partnership is formed consisting of one of the members of the old firm and a new member, and the new member retires from the firm, and transfers his interests in the costs of the suit before the money is col-

ordinary course of its business; <sup>11</sup> thus there is no firm liability for a sum borrowed by one of the partners for his own purposes. <sup>12</sup>

§ 293. Acts of Substitutes. — As a general rule an attorney has no power to delegate the authority reposed in him to another, <sup>13</sup> and if he does so, without his client's consent, he becomes liable for negligence, default, or wrongdoing on the part of his substitute. <sup>14</sup> Thus an attorney who receives a claim for collection binds himself to exercise reasonable care, skill and diligence in the performance of the duties so undertaken, and the fact that he entrusts another with the collection does not relieve him from his obligations in this respect. <sup>15</sup> This measure of responsibility may, of course, be some-

lected, the retiring member is not liable for the default of his former partner in not paying over the money afterwards received by him.

<sup>11</sup>*Plumer v. Gregory*, L. R. 18 Eq. (Eng.) 621, 43 L. J. Ch. 616; *Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61, 3 C. & K. 272, 17 Jur. 1096. See also *Sims v. Brutton*, 5 Exch. (Eng.) 802, 20 L. J. Exch. 41; *Chilton v. Cooke*, 37 L. T. N. S. (Eng.) 607; *Hedley v. Bainbridge*, 3 Q. B. 316, 43 E. C. L. 752, 2 Gale & D. 483; *Marsh v. Gold*, 2 Pick. (Mass.) 285. See also *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178, wherein it was held that the fact that one member of a firm of attorneys employed to manage a will contest conspired with one of the heirs to cheat the others out of their share of a settlement, after the money had been paid over to the attorney in fact of the contesting heirs, does not render the firm liable for a diversion of the funds, where it acted in good faith until the settlement was made and money paid over.

<sup>13</sup>*Breckenridge v. Shrieve*, 4 Dana (Ky.) 375.

<sup>12</sup> See *supra*, § 210.

But see *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360, wherein it was held that the power to sue for a debt implies and carries with it the power to collect it; and that the attorney in whose hands it may have been originally placed for collection may place such claims in the hands of other attorneys for the purpose of bringing suit, where it is impracticable or inconvenient for the original attorneys to attend personally to the case. See also *Singer v. Steele*, 24 Ill. App. 58.

<sup>14</sup>*Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39; *Kingston Bank v. Roosa*, 2 How. Pr. (N. Y.) 8; *Rogers v. McKenzie*, 81 N. C. 164. See also *Goodman v. Walker*, 30 Ala. 492, 68 Am. Dec. 134.

<sup>15</sup>*England*.—*Stephens v. Badcock*, 3 B. & Ad. 354, 23 E. C. L. 93; *Simmons v. Rose*, 31 Beav. 1.

*Alabama*.—*Mardis v. Shackleford*, 4 Ala. 493; *Lewis v. Peck*, 10 Ala. 142.

*Arkansas*.—*Cummins v. McLain*, 2 Ark. 402; *Kellogg v. Norris*, 10 Ark. 18.

*Illinois*.—*Walker v. Stevens*, 79 Ill. 193.

*Indiana*.—*Pollard v. Rowland*, 2

what changed by contract,<sup>16</sup> as, for instance, an agreement to the effect that the client assumes the risk of negligence or default on the part of the attorney's agent or substitute.<sup>17</sup>

§ 294. Acts of Clerks and Assistants. — The general rule is that an attorney is bound by the acts of a clerk, or other person, in charge of his office, or of business entrusted to the attorney, in so far as such person acts within the apparent scope of his authority.<sup>18</sup>

*Blackf.* 22; *Abbott v. Smith*, 4 Ind. 452; *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

*Iowa*.—*Antrobus v. Sherman*, 65 Ia. 230, 21 N. W. 579, 54 Am. Rep. 7.

*Kansas*.—*Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264.

*Maryland*.—*Dentzel v. City, etc., R. Co.*, 90 Md. 434, 45 Atl. 201.

*Mississippi*.—*Grayson v. Wilkinson*, 5 Smedes & M. 268; *Wilkinson v. Griswold*, 12 Smedes & M. 669; *Dickson v. Wright*, 52 Miss. 585, 24 Am. Rep. 677.

*Nebraska*.—*McDowell v. Gregory*, 14 Neb. 33, 14 N. W. 899.

*New York*.—See *Talcott v. Cowdry*, 17 Misc. 333, 39 N. Y. S. 1076.

*Pennsylvania*.—*Riddle v. Poorman*, 3 P. & W. 224; *Krause v. Dorrance*, 10 Pa. St. 462, 51 Am. Dec. 496; *Rhines v. Evans*, 66 Pa. St. 192, 5 Am. Rep. 365; *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 668. See also *Morgan v. Tener*, 83 Pa. St. 305, 3 W. N. C. 398, reversing 10 Phila. 412, 32 Leg. Int. 98, 1 W. N. C. 283.

*Tennessee*.—*Porter v. Vance*, 14 Lea 629.

A collection agency employed to collect a claim, who place said claim in the hands of an attorney, through whose misconduct it is lost, are liable therefor in the absence of an express stipulation to the contrary in their

receipt given for the claim. *Morgan v. Tener*, 83 Pa. St. 305.

<sup>16</sup> In *Sanger v. Dun*, 47 Wis. 615, 3 N. W. 388, 32 Am. Rep. 789, it appears that the plaintiffs delivered to the defendants a claim for collection, taking a receipt which stated that it was to be transmitted by mail for collection or adjustment to an attorney, at the risk and on account of plaintiffs, and the proceeds paid over or accounted for to them when received. They also signed a receipt in defendants' books, which stated the nature and amount of the claim and the giving of such receipt, reciting its terms; and it was held that, in the absence of gross negligence in making the selection, defendants were not liable for the default of an attorney employed by them for making such collection.

<sup>17</sup> *Bullitt v. Baird*, 27 Leg. Int. (Pa.) 171.

<sup>18</sup> *England*.—*Cornelius v. Harrison*, 2 F. & F. 758.

*Illinois*.—*Hardy v. Keeler*, 56 Ill. 152.

*Iowa*.—*Hayward v. Goldsburly*, 63 Iowa 436, 19 N. W. 307.

*Massachusetts*.—*Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39, distinguished in *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 933, 4 Am. St. Rep. 284; *Mahoney v. Middlesex County*, 144

But an attorney will not be responsible for the conduct of one who assumes to act for him without authority; thus where, during the absence of an attorney from home, his wife received and opened a letter addressed to him containing a draft payable to his order for collection, and the drawee paid the amount of the draft to her, it was held that as she had no authority to receive payment, the drawee was not discharged.<sup>19</sup> Whether communications made to clerks, etc., are privileged, has been considered heretofore.<sup>20</sup>

*Liability of Attorney to Third Persons.*

§ 295. For Fraudulent or Tortious Acts. — An attorney's liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part.<sup>1</sup> Thus counsel are responsible where they have occasioned loss by wrongfully stopping goods *in transitu*,<sup>2</sup> or directing the seizure and conversion of goods on attachment proceedings,<sup>3</sup> or conspiring with arbitrators to obtain an unjust award,<sup>4</sup> or for advising a justice of

Mass. 459, 11 N. E. 689; Johnson v. Sprague, 183 Mass. 102, 66 N. E. 422.

New York.—McGuinness v. Manhattan R. Co., 69 App. Div. 606, 74 N. Y. S. 1054; Power v. Kent, 1 Cow. 211; Birkbeck v. Stafford, 14 Abb. Pr. 285, 23 How. Pr. 236.

<sup>19</sup> Day v. Boyd, 6 Heisk. (Tenn.) 458.

<sup>20</sup> See *supra*, § 100.

<sup>1</sup> England.—Barker v. Braham, 3 Wils. C. Pl. 368; Crook v. Wright, 1 R. & M. 278, 21 E. C. L. 438. See also Stockley v. Hornidge, 8 C. & P. 11, 34 E. C. L. 272; Green v. Elgie, 5 Q. B. 99, 48 E. C. L. 99, Dav. & M. 129.

Kentucky.—Revill v. Pettit, 3 Metc. 314; Hazelrigg v. Brenton, 2 Duv. 525.

Massachusetts.—Bicknell v. Dorion, 16 Pick. 478.

Minnesota.—Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

Missouri.—Peck v. Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; Cameron Sun v. McAnaw, 72 Mo. App. 196.

Nebraska.—Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104.

New Jersey.—Schalk v. Kingsley, 42 N. J. L. 32.

New York.—See Newberry v. Lee, 3 Hill 525; Deyo v. Van Valkenburgh, 5 Hill 242; Sleight v. Leavenworth, 5 Duer 122.

<sup>2</sup> Poole v. Houston & T. C. R. Co., 58 Tex. 134, 9 Am. & Eng. R. Cas. 197.

<sup>3</sup> Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104.

<sup>4</sup> Hoosac Tunnel Dock, etc., Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323.

the peace to act in violation of the law,<sup>5</sup> or for abuse of process,<sup>6</sup> or for bringing groundless suits,<sup>7</sup> or for any other unauthorized act by which third persons are injured,<sup>8</sup> such as falsely pretending to act with authority from the client in making an agreement whereby rights were relinquished by the third person.<sup>9</sup> But an attorney at law is not to be charged with participation in the evil intentions of his client merely because he acts as attorney for such client when charged with fraudulent intent, or when his acts have proved to be fraudulent.<sup>10</sup> Where an attorney acts in good faith, and within the scope of his authority, he will be protected;<sup>11</sup> but it

<sup>5</sup> *Revill v. Pettit*, 3 Metc. (Ky.) 314.

<sup>6</sup> *Dishaw v. Wadleigh*, 15 App. Div. 205, 4 N. Y. Ann. Cas. 170, 44 N. Y. S. 207.

<sup>7</sup> *Burnap v. Marsh*, 13 Ill. 538; *Peck v. Chouteau*, 91 Mo. 151, 3 S. W. 577, 60 Am. Rep. 230.

*Two Persons of Same Name—Suing or Issuing Execution against Wrong Individual.*—An attorney employed to bring a suit against a certain party, who by mistake brings it against another party of the same name and obtains judgment and execution against him, or who, having sued the right defendant, issues execution by mistake against a party having the same name as the defendant, is not liable in trespass, the wrong being purely an unintentional error and not malicious. *Davies v. Jenkins*, 1 Dowl. & L. 321, 11 M. & W. 745, 7 Jur. 801. See also *Cooper v. Harding*, 7 Q. B. 928, 53 E. C. L. 928, 9 Jur. 777; *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596.

*Malice Essential.*—In an action brought against an attorney for damages for maliciously inciting an insolvent person to prosecute an unfounded action against the plaintiff, and which was prosecuted under a champertous

agreement, it is proper to instruct that the plaintiff must show malice and want of probable cause, as in an action for malicious prosecution, and the action is not maintainable as a claim for damages for champerty irrespective of malice. *Smits v. Hogan*, 35 Wash. 290, 1 Ann. Cas. 297, 77 Pac. 390. And see *Anderson v. Canaday*, (Okla.) 131 Pac. 697.

<sup>8</sup> *Anonymous*, 1 Mod. (Eng.) 209; *Field v. Gibbs*, Pet. (C. C.) 155, 9 Fed. Cas. No. 4,766; *Walworth v. Henderson*, 9 La. Ann. 339; *Jones v. Wolcott*, 2 Allen (Mass.) 251; *Wilmerdings v. Fowler*, 14 Abb. Pr. N. S. (N. Y.) 249.

<sup>9</sup> *Harmening v. Howland*, (N. D.) 141 N. W. 131.

<sup>10</sup> *McKinney v. Curtiss*, 60 Mich. 611, 27 N. W. 691. And see *infra*, § 302.

<sup>11</sup> *England.*—*Barnes v. Addy*, L. R. 9 Ch. 244, 43 L. J. Ch. 513, 30 L. T. N. S. 4.

*Georgia.*—*Brand v. Craig*, 84 Ga. 12, 10 S. E. 369.

*Louisiana.*—*Heffner v. Wise*, 51 La. Ann. 1637, 26 So. 415.

*Massachusetts.*—*Bicknell v. Dorion*, 16 Pick. 478.

*Pennsylvania.*—*Kier v. Quin*, 4 Walk. 339.

is not necessary to show a conspiracy between the attorney and his client, since the attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest.<sup>13</sup>

§ 296. For False Arrest or Imprisonment. — The fact that an attorney at law has been retained to bring or prosecute an action does not justify him in knowingly becoming the mere instrument of his client in the unwarranted arrest or imprisonment of another.<sup>14</sup> Counsel who institute groundless suits in furtherance of their own malevolence, or that of their clients, in consequence of which another is falsely arrested or imprisoned, are undoubtedly liable in damages.<sup>14</sup> The law cannot sustain the perversion of its process to shield lawlessness and wrong, or permit it to be made the tool of trickery and cunning.<sup>15</sup> An attorney will be responsible for advising a magistrate to arrest, or to commit one to prison, where the magistrate was not, under the law, authorized to do so,<sup>16</sup> or for a false and malicious arrest on a body execution;<sup>17</sup> but an attorney who, under special instructions from his client, unlawfully procures the issuance of an execution against the body of the judgment debtor, is not liable for damages to the debtor by reason of his confinement by the sheriff among convicts and criminals.<sup>18</sup> So, of course, there is no liability where the attorney acts in good faith.<sup>19</sup>

*South Carolina.*—Wigg v. Simon-ton, 12 Rich. L. 583.

*Texas.*—Kruegel v. Murphy, 126 S. W. 343.

<sup>13</sup> Burnap v. Marsh, 13 Ill. 535.

<sup>14</sup> Burnap v. Marsh, 13 Ill. 535; Thompson v. Hatch, 4 N. Bruns. 425.

<sup>15</sup> Green v. Elgie, 5 Q. B. 99, 48 E. C. L. 99; Codrington v. Lloyd, 8 Ad. & El. 449, 35 E. C. L. 433, 2 Jur. 593, 3 N. & P. 442; Barker v. Braham, 2 W. Bl. (Eng.) 866, 3 Wils. C. Pl. 368; Thompson v. Hatch, 4 N. Bruns. 425; Burnap v. Marsh, 13 Ill. 535.

<sup>16</sup> Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. S. 207, 4 N. Y. Ann. Cas.

170, quoting Sneed v. Harris, 109 N. C. 349, 13 S. E. 920, 14 L.R.A. 389.

<sup>17</sup> Revill v. Pettit, 3 Metc. (Ky.) 314; Roth v. Shupp, 94 Md. 55, 50 Atl. 430.

<sup>18</sup> Barker v. Braham, 2 W. Bl. (Eng.) 866; Crozer v. Pilling, 4 B. & C. 26, 10 E. C. L. 271, 6 Dowl. & R. 129; Thompson v. Hatch, 4 N. Bruns. 425; Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242; Sleight v. Leavenworth, 5 Duer (N. Y.) 122.

<sup>19</sup> Baker v. Secor, 51 Hun 643 mem., 4 N. Y. S. 303.

<sup>20</sup> Peck v. Chouteau, 91 Mo. 138, 3

### § 297. For Unlawful Execution and Seizure of Property.

— An attorney is responsible in damages for loss occasioned to third persons where he knowingly causes the issuance of an illegal execution, or the direction of an unlawful levy,<sup>30</sup> or for any other tortious seizure of the property of another,<sup>1</sup> as, for instance, by way of attachment.<sup>2</sup> It must be remembered, in this connection, that an attorney has implied authority to issue an execution for

S. W. 577, 60 Am. Rep. 236. And see *infra*, § 302.

"When a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterwards vacated or set aside as erroneous or void, or subject the party procuring it to an action for damages thereby inflicted. Where the jurisdiction of the court is made to depend upon the existence of some fact of which there is an entire absence of proof, it has no authority to act in the premises; and if it, nevertheless, proceeds and entertains jurisdiction of the proceeding, all of its acts are void, and afford no justification to the parties instituting them as against parties injuriously affected thereby. But if the facts presented to the court call upon it for the exercise of judgment and reason, upon evidence which might in its consideration affect different minds differently, a judicial question is presented, which, however decided, does not render either party or the court making it liable for the consequences of its action." *Fischer v. Langbein*,

103 N. Y. 84, 8 N. E. 251, *affirming* 10 Abb. N. Cas. 128, 62 How. Pr. 238, 13 Abb. N. Cas. 10, 65 How. Pr. 382.

<sup>30</sup> *England*.—*Rowles v. Senior*, 8 Q. B. 677, 55 E. C. L. 677, 10 Jur. 354; *Codrington v. Lloyd*, 8 Ad. & El. 449, 35 E. C. L. 433, 2 Jur. 593, 3 N. & P. 442; *Crozer v. Pilling*, 4 B. & C. 26, 10 E. C. L. 271, 6 Dowl. & R. 129; *Bates v. Pilling*, 6 B. & C. 38, 13 E. C. L. 104, 9 Dowl. & R. 44; *Childers v. Wooler*, 2 El. & El. 287, 105 E. C. L. 287.

*Alabama*.—*Florence Cotton & Iron Co. v. Louisville Banking Co.*, 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50.

*Massachusetts*.—*Train v. Gold*, 5 Pick. 380.

*Nebraska*.—*Peckinbaugh v. Quillin*, 12 Neb. 586, 12 N. W. 104.

*New York*.—*Newberry v. Lee*, 3 Hill 523; *Ford v. Williams*, 24 N. Y. 359.

*Texas*.—*Cunningham v. Coyle*, 2 Willson Civ. Cas. Ct. App. § 424.

*West Virginia*.—*Parsons v. Maxwell*, 53 W. Va. 39, 44 S. E. 172.

<sup>1</sup> *Hardy v. Keeler*, 56 Ill. 152; *Arnold v. Phillips*, 59 Ill. App. 213.

<sup>2</sup> *Connecticut*.—*Higgins v. Russo*, 72 Conn. 238, 43 Atl. 1050, 77 Am. St. Rep. 307.

*Georgia*.—*Williams v. Inman*, 1 Ga. App. 321, 57 S. E. 1009.



the enforcement of his client's demands, and that he may also instruct the officer as to the proper execution thereof.<sup>3</sup> Therefore, an attorney who merely performs his duties, and exercises his power, in good faith, is not liable to anyone.<sup>4</sup> Thus he is not to be deemed a wrongdoer merely because he delivered the process to the proper officer,<sup>5</sup> or because he conveyed his client's directions to such officer,<sup>6</sup> or because the officer committed a trespass;<sup>7</sup> and it has been asserted that a liability of this character attaches only when the attorney acts dishonestly, or with some improper purpose of his own which, in law, amounts to malice.<sup>8</sup> Where an attorney gives the officer an indemnifying bond in the name of his client, it seems that he cannot be held liable as a trespasser.<sup>9</sup>

§ 298. **For Overpayments.**—An attorney is responsible for an overpayment made to him for his client,<sup>10</sup> especially if it remains in his hands.<sup>11</sup> The rule that money paid under a mistake of law is not recoverable back, is inapplicable as between attorney

*Kentucky.*—Wood v. Weir, 5 B. Mon. 544.

*Michigan.*—Cook v. Hopper, 23 Mich. 511.

*Nebraska.*—Peckinbaugh v. Quillin, 12 Neb. 586, 12 N. W. 104.

<sup>3</sup> See *supra*, §§ 276-280.

<sup>4</sup> *England.*—Sedley v. Sutherland, 3 Esp. 202; Carrett v. Smallpage, 9 East 330.

*Georgia.*—Hunt v. Printup, 28 Ga. 297.

*Illinois.*—Hardy v. Keeler, 56 Ill. 152.

*Iowa.*—Rice v. Melendy, 41 Iowa 395; Dawson v. Buford, 70 Iowa 127, 30 N. W. 35.

*Michigan.*—Cook v. Hopper, 23 Mich. 511.

*New Jersey.*—Schalk v. Kingsley, 42 N. J. L. 33.

<sup>5</sup> Gaskill v. Glass, 1 B. Mon. (Ky.) 252; Ford v. Williams, 13 N. Y. 577, 578, 67 Am. Dec. 83; Hammon v. Fisher, 2 Grant Cas. (Pa.) 330.

<sup>6</sup> Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

<sup>7</sup> Sowell v. Champion, 6 Ad. & El. 407, 33 E. C. L. 92, 2 N. & P. 627; Seaton v. Cordray, Wright (Ohio) 102.

<sup>8</sup> Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866. See also Wigg v. Simonton, 12 Rich. L. (S. C.) 583.

<sup>9</sup> Ford v. Williams, 13 N. Y. 584, 67 Am. Dec. 83.

<sup>10</sup> *Illinois.*—Keithley v. Foster, 132 Ill. App. 299.

*Massachusetts.*—Fowler v. Shearer, 7 Mass. 23.

*New York.*—Moulton v. Bennett, 18 Wend. 586.

*Tennessee.*—Metcalf v. Denson, 4 Baxt. 565.

*Texas.*—Croft v. Hicks, 26 Tex. 383.

<sup>11</sup> Keithley v. Foster, 132 Ill. App. 299.

and client, or as between the attorney and the opposite party; <sup>12</sup> nor does the rule that the principal is alone liable for money paid to his agent, apply.<sup>13</sup> Payment over to the client in good faith will, it seems, protect the attorney,<sup>14</sup> but the fact of such payment must be clearly established.<sup>15</sup>

### § 299. For Moneys Received on Account of Third Person.

— Where an attorney has personal knowledge, or has been notified, of the fact that money in his possession, or to come into his possession, is the property of a third person, it is his duty to pay it to such person, and failing to do so he will be liable therefor; <sup>16</sup> and that an order after reversal to restore money received by an attorney and paid over in part was entered against the party does not absolve the attorney from his liability to make restitution of the money.<sup>17</sup> It has been so held where the attorney had knowledge of an assignment by his client to a third person.<sup>18</sup> So, where an attorney obtains an order for the payment to him of a fund in court, he may be charged, as well as his client, with its restoration; his action in obtaining the fund being a fraud on the court.<sup>19</sup>

<sup>12</sup> *Moulton v. Bennett*, 18 Wend. (N. Y.) 586, wherein it appears that the amount due was fixed by statute.

<sup>13</sup> *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565.

<sup>14</sup> *McDonald v. Napier*, 14 Ga. 89; *Wright v. Aldrich*, 60 N. H. 161; *Wilmerdings v. Fowler*, 55 N. Y. 641.

Compare *Metcalf v. Denson*, 4 Baxt. (Tenn.) 565. See also *Murray v. De Jarnett*, 15 Ky. L. Rep. 879.

<sup>15</sup> *Keithley v. Foster*, 132 Ill. App. 299; *Wilmerdings v. Fowler*, 55 N. Y. 641.

<sup>16</sup> *Alabama*.—*Leach v. Williams*, 8 Ala. 759.

*Kentucky*.—*Murray v. De Jarnett*, 15 Ky. L. Rep. 879.

*Massachusetts*.—*Nettleton v. Beach*, 107 Mass. 499.

*Michigan*.—*Beistle v. McConnell*, 141 Mich. 463, 104 N. W. 729, 12 Detroit Leg. N. 505.

*New York*.—*Newton v. Porter*, 5 Lans. 416; *Fowler v. Lowenstein*, 7 Lans. 167; *Ward v. Webster*, 9 Daly 182; *Sims v. Brown*, 6 Thomp. & C. 5; *Shotwell v. Dixon*, 66 App. Div. 123, 72 N. Y. S. 668; *Mulcahy v. Devlin*, 2 N. Y. City Ct. 218.

*South Carolina*.—*Sams v. Rhett*, 2 McM. L. 171. See also *Wigg v. Simonton*, 12 Rich. L. 583.

*South Dakota*.—*Knott v. Kirby*, 10 S. D. 30, 71 N. W. 138.

*Vermont*.—*Bell v. Mason*, 10 Vt. 509.

*Wisconsin*.—*Blizzard v. Brown*, 152 Wis. 160, 139 N. W. 737.

<sup>17</sup> *Blizzard v. Brown*, 152 Wis. 160, 139 N. W. 737.

<sup>18</sup> *Gayle v. Benson*, 3 Ala. 234.

<sup>19</sup> *Uhl v. Kohlmann*, 52 App. Div. 455, 65 N. Y. S. 197.

§ 300. For Negligence. — In the chapter following the liability of an attorney for negligence is fully considered.<sup>20</sup> It is apparent, however, that liability of this character must be confined to the client. An attorney is under no obligation to exercise reasonable care, skill, and diligence towards strangers, as he is with respect to his client, and, therefore, he is not responsible to them for mere negligence.<sup>1</sup> An attorney's liability to third persons because of his fraud or tort is not an exception to this rule.<sup>2</sup>

§ 301. As Garnishee. — It is well settled that an attorney at law may be summoned as the garnishee of funds of his client in his possession,<sup>3</sup> even though there was no previous demand.<sup>4</sup> It is immaterial that the client instructed his attorney to pay certain

<sup>20</sup> See *infra*, §§ 312-330.

<sup>1</sup> *National Savings Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L.R.A. 862; *Roddy v. Missouri Pac. R. Co.* 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L.R.A. 746; *Killip v. Empire Mill Co.*, 2 Nev. 34; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631.

<sup>2</sup> Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the person injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privity between himself and the wronged one. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L.R.A. 862.

<sup>3</sup> *Alabama*.—*Mann v. Buford*, 3 Ala. 312, 37 Am. Dec. 691.

*Georgia*.—*Tucker v. Butts*, 6 Ga. 580; *Carr v. Benedict*, 48 Ga. 431.

*Louisiana*.—*Comstock v. Paie*, 18 La. 479; *White v. Bird*, 20 La. Ann. 188, 96 Am. Dec. 393; *Daigle v. Bird*, 22 La. Ann. 138.

Attys. at L. Vol. I.—34.

*Maine*.—*Staples v. Staples*, 4 Greenl. 532 (foreign attachments). *Burnell v. Weld*, 59 Me. 423; *Abbott v. Stinchfield*, 71 Me. 213.

*Massachusetts*.—*Coburn v. Ansart*, 3 Mass. 319; *Thayer v. Sherman*, 12 Mass. 441.

*Nebraska*.—*Scott v. Kirschbaum*, 47 Neb. 331, 66 N. W. 443.

*New Hampshire*.—*Narramore v. Clark*, 63 N. H. 166.

*Pennsylvania*.—*Riley v. Hirst*, 2 Pa. St. 346; *Board of Health v. Potts*, 2 Pa. L. J. Rep. 52, 3 Pa. L. J. 268.

*Compare* *Johns v. Allen*, 5 Har. (Del.) 419, wherein it was said: "It will lead to great inconvenience, if attorneys of this court, into whose hands moneys are every day paid for the use of their clients and other trust purposes, are to be compelled to answer to attachments issued by justices of the peace from all parts of the county, even in conflict with the orders of, and necessary attendance upon this court."

<sup>4</sup> *Staples v. Staples*, 4 Greenl. (Me.) 532.

creditors out of the fund when collected;<sup>5</sup> but where an attorney was ordered by his client to pay funds to certain creditors who, upon receiving the attorney's obligation for the amounts due to them, thereupon surrendered their claims against the client as paid, it was held that, the transaction having been *bona fide*, the funds in question became the property of such creditors, and were not subject to attachment as the property of the client.<sup>6</sup> An attorney's liability in this respect, however, is no greater than that of any other garnishee. The mere right to collect a claim or demand for his client does not make him liable; funds belonging to his client must actually be in his hands.<sup>7</sup>

§ 302. **Effect of Acting in Good Faith.** — It is a general rule that attorneys at law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients.<sup>8</sup> Thus they may prosecute any action which the client believes to be just,<sup>9</sup> and it is immaterial that, later, it proves to be

<sup>5</sup> *Sterrett v. Miles*, 87 Ala. 472, 6 So. 356.

<sup>6</sup> *Walton v. Bethune*, 37 Ga. 319; *Southwestern Land Co. v. Ellis*, 104 Wis. 445, 80 N. W. 749.

<sup>7</sup> *Iowa*.—*Smith v. Clarke*, 9 Ia. 241.

*Massachusetts*.—*Wheelock v. Tuttle*, 10 Cush. 123; *Hancock v. Colyer*, 99 Mass. 187, 96 Am. Dec. 730; *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566.

*Mississippi*.—*Mayes v. Phillips*, 60 Miss. 547.

*New Hampshire*.—*Howland v. Spencer*, 14 N. H. 580.

*Pennsylvania*.—*Nesmith v. Drum*, 8 Watts & S. 9, 42 Am. Dec. 260.

*Vermont*.—*Hitchcock v. Egerton*, 8 Vt. 202; *Hurlburt v. Hicks*, 17 Vt. 193, 44 Am. Dec. 329.

<sup>8</sup> *United States*.—*Campbell v. Brown*, 2 Woods 349, 4 Fed. Cas. No. 2,355.

*California*.—*Hathaway v. Brady*, 26 Cal. 581.

*Georgia*.—*Brand v. Craig*, 84 Ga. 12, 10 S. E. 369.

*Iowa*.—*Lyon v. Tevis*, 8 Iowa 79.

*Maryland*.—*Roth v. Shupp*, 94 Md. 55, 50 Atl. 430.

*Michigan*.—*McKinney v. Curtiss*, 60 Mich. 611, 619, 27 N. W. 691.

<sup>9</sup> *Illinois*.—*Burnap v. Marsh*, 13 Ill. 535.

*Massachusetts*.—*Bicknell v. Dorion*, 16 Pick. 478.

*Michigan*.—*Wheaton v. Whittemore*, 49 Mich. 348, 13 N. W. 769.

*Missouri*.—*Peck v. Chouteau*, 91 Mo. 151, 3 S. W. 577, 60 Am. Rep. 236.

*New York*.—*Fischer v. Langbein*, 103 N. Y. 84, 8 N. E. 251, 13 Abb. N. Cas. 10.

groundless.<sup>10</sup> So, also, attorneys may interpose any supposed defense in behalf of their clients.<sup>11</sup>

*Liability of Client to Third Persons.*

§ 303. **For Acts of Attorney.**—In the transaction of professional undertakings, the attorney is the agent of his client in so far as he acts within the apparent scope of his authority,<sup>12</sup> and, therefore, the client is bound by the acts of the attorney in the due prosecution of the business for which he was retained, and must respond in damages to third persons who have suffered loss or injury in consequence thereof.<sup>13</sup> It is immaterial in this respect that the attorney has been false to his trust and, for that reason, has become personally liable to the client.<sup>14</sup> Within this rule the client is liable where the attorney's conduct has injured another by a trespass,<sup>15</sup> or by a false arrest or imprisonment,<sup>16</sup> or by an unlawful

<sup>10</sup> *Schalk v. Kingsley*, 42 N. J. L. 32.

<sup>11</sup> *Kruegel v. Murphy*, (Tex.) 126 S. W. 343.

<sup>12</sup> As to an attorney's general authority, see *supra*, §§ 199–214. As to his authority to appear for litigants, see *supra*, §§ 229–233. As to his authority in the conduct of litigation, see *supra*, §§ 246–283.

<sup>13</sup> *United States*.—*Putnam v. Day*, 22 Wall. 60, 22 U. S. (L. ed.) 764.

*Arkansas*.—*Lawson v. Bettison*, 12 Ark. 401.

*Colorado*.—*Warner v. Gunnison*, 2 Colo. App. 430, 31 Pac. 238.

*Illinois*.—*Stenzel v. Sims*, 25 Ill. App. 538.

*Indiana*.—*Harvey v. Fink*, 111 Ind. 249, 12 N. E. 396.

*Maryland*.—*African Methodist Bethel Church v. Carmack*, 2 Md. Ch. 143; *Thornburg v. Macauley*, 2 Md. Ch. 425.

*Michigan*.—*Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.

*Minnesota*.—*Johnson v. Dun*, 75 Minn. 533, 78 N. W. 98.

*Missouri*.—*McDonough v. Daly*, 3 Mo. App. 606.

*New Hampshire*.—*Morgan v. Joyce*, 66 N. H. 538, 27 Atl. 225.

*New Jersey*.—*Leo v. Green*, 52 N. J. Eq. 1, 28 Atl. 904.

*New York*.—*Russell v. Lane*, 1 Barb. 519; *Guillaume v. Rowe*, 63 How. Pr. 175.

*North Carolina*.—*Greenlee v. McDowell*, 39 N. C. 481; *Boing v. Raleigh*, etc., R. Co., 88 N. C. 62; *Beck v. Bellamy*, 93 N. C. 129.

*Texas*.—*Chambers v. Hodges*, 23 Tex. 104.

<sup>14</sup> *Selz v. Guthman*, 62 Ill. App. 624.

<sup>15</sup> *Main Electric Co. v. Cohen*, 72 Misc. 30, 129 N. Y. S. 66.

<sup>16</sup> *England*.—*Barker v. Braham*, 2 W. Bl. 866; *Collett v. Foster*, 2 H. & N. 356.

*Canada*.—*Wilson v. Brecker*, 11 U. C. C. P. 268.

*Massachusetts*.—*Shattuck v. Bill*,

attachment,<sup>17</sup> or other seizure of property,<sup>18</sup> or by an illegal execution or levy,<sup>19</sup> or by wrongfully obtaining an order of sale,<sup>20</sup> or by fraud<sup>1</sup> in which the other party did not participate.<sup>2</sup> In the absence of knowledge or ratification of the attorney's acts, however, his client's liability will, it seems, be confined to actual damages.<sup>3</sup> Where the attorney acts without authority, or beyond the apparent scope of his authority, the client cannot be held responsible,<sup>4</sup>

142 Mass. 56, 7 N. E. 39, *distinguished* in *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 933, 4 Am. St. Rep. 284.  
*Missouri*.—Brueckner v. Frederick, 109 Mo. App. 614, 83 S. W. 775.

*New York*.—Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141, *affirming* 48 Super. Ct. 169; *Sleight v. Leavenworth*, 5 Duer 122.

*Vermont*.—Gibson v. Holmes, 78 Vt. 110, 62 Atl. 11, 4 L.R.A. (N.S.) 451.

<sup>17</sup> *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114; *Fairbanks v. Stanley*, 18 Me. 296; *Brown v. Spiegel*, 156 Mich. 138, 120 N. W. 579, 16 Detroit Leg. N. 43; *Oestrich v. Gilbert*, 9 Hun (N. Y.) 242; *Poucher v. Blanchard*, 86 N. Y. 258.

<sup>18</sup> *Feury v. McCormick Harvesting Mach. Co.*, 6 S. D. 396, 61 N. W. 162.

<sup>19</sup> *Maine*.—Jenney v. Delesdernier, 20 Me. 192.

*Michigan*.—Foster v. Wiley, 27 Mich. 244, 15 Am. Rep. 185.

*Missouri*.—Howell v. Caryl, 50 Mo. App. 440.

*New York*.—Gorham v. Gale, 7 Cow. 744, 17 Am. Dec. 549; *Barber v. Dewes*, 101 App. Div. 432, 91 N. Y. S. 1059, *affirmed* 184 N. Y. 548, 76 N. E. 1089; *Poucher v. Blanchard*, 86 N. Y. 258.

*Pennsylvania*.—Gillingham v. Clark, 1 Phila. 51, 7 Leg. Int. 50.

<sup>20</sup> *Vaughn v. Fisher*, 32 Mo. App. 29.

<sup>1</sup> *McDonald v. Todd*, 1 Grant Cas. (Pa.) 17.

<sup>2</sup> The general rule that a client is bound by the acts of his attorney, does not hold good when the acts of the attorney were done in pursuance of a fraudulent confederation of the attorney with the adverse party. *Roller v. McGraw*, 63 W. Va. 462, 60 S. E. 410, 411.

<sup>3</sup> *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114.

<sup>4</sup> *United States*.—Burnap v. Albert, Taney 244, 4 Fed. Cas. No. 2,170.

*Colorado*.—Graham v. Reno, 5 Colo. App. 330, 38 Pac. 835.

*Georgia*.—Philadelphia Fire Assoc. v. Fleming, 78 Ga. 733, 3 S. E. 420.

*New Jersey*.—Fidelity Trust Co. v. Baker, 60 N. J. Eq. 170, 47 Atl. 6.

*New York*.—Guilfoyle v. Seeman, 41 App. Div. 516, 58 N. Y. S. 608; *Hall v. Baker*, 66 App. Div. 131, 72 N. Y. S. 965; *Fischer v. Hetherington*, 11 Misc. 575, 32 N. Y. S. 795; *Wiegmann v. Morimura*, 12 Misc. 37, 33 N. Y. S. 39, *affirming* 9 Misc. 715, 29 N. Y. S. 1151; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519.

*North Carolina*.—West v. A. P. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

*Oregon*.—Neimitz v. Conrad, 22 Ore. 164, 29 Pac. 548.

though the attorney's acts in so proceeding beyond the scope of his authority may impose liability on himself.<sup>5</sup>

**§ 304. For Statements in Pleadings.**—The general rule in this country is that matter inserted in a pleading in a civil action is not absolutely but only conditionally or qualifiedly privileged; that is, the alleged libelous matter is privileged when, and only when, it is relevant or pertinent to, or connected with, the subject-matter of the litigation.<sup>6</sup> A similar rule obtains in some of the

*Texas*.—Galveston, etc., R. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

<sup>5</sup> See *supra*, §§ 295–302.

<sup>6</sup> *United States*.—Union Mut. L. Ins. Co. v. Thomas, 83 Fed. 803, 48 U. S. App. 575, 28 C. C. A. 96; King v. McKissich, 126 Fed. 215.

*District of Columbia*.—Harlow v. Carroll, 6 App. Cas. 128.

*Florida*.—Myers v. Hodges, 53 Fla. 197, 44 So. 357.

*Georgia*.—Conley v. Key, 98 Ga. 115, 25 S. E. 914; Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274.

*Illinois*.—Strauss v. Meyer, 48 Ill. 385; Ash v. Zwietusch, 159 Ill. 455, 42 N. E. 854, *affirming* 57 Ill. App. 157.

*Iowa*.—Hawk v. Evans, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247.

*Kentucky*.—Forbes v. Johnson, 11 B. Mon. 48; Monroe v. Davis, 118 Ky. 806, 82 S. W. 450.

*Louisiana*.—Wallis v. New Orleans, etc., R. Co., 29 La. Ann. 66; Vinas v. Merchants' Mut. Ins. Co., 33 La. Ann. 1265; Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; Randall v. Hamilton, 45 La. Ann. 1184, 14 So. 73, 22 L.R.A. 649; Youree v. Hamilton, 45 La. Ann. 1191, 14 So. 77; Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856; Dunn v. Southern Ins. Co., 116 La. 431, 40 So. 786. See also Weil v. Israel, 42 La.

Ann. 955, 8 So. 826; Monroe v. H. Weston Lumber Co., 49 La. Ann. 594, 21 So. 742.

*Massachusetts*.—McLaughlin v. Cowley, 127 Mass. 316, 131 Mass. 70.

*Michigan*.—See Hartung v. Shaw, 130 Mich. 177, 89 N. W. 701.

*Minnesota*.—Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L.R.A. 153.

*Missouri*.—Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L.R.A. 445.

*New York*.—Garr v. Selden, 4 N. Y. 91, *reversing* 6 Barb. 416; Marsh v. Ellsworth, 50 N. Y. 309, *affirming* 36 How. Pr. 532, 2 Sweeny 589; Moore v. Manufacturer's Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L.R.A. 753, *reversing* 51 Hun 472, 4 N. Y. S. 378; Gilbert v. People, 1 Den. 41; Dada v. Piper, 41 Hun 254, 2 N. Y. St. Rep. 152; Perzel v. Tousey, 52 Super. Ct. 79; Prescott v. Tousey, 53 Super. Ct. 56.

*Ohio*.—Lanning v. Christy, 30 Ohio St. 115, 27 Am. Rep. 431.

*Pennsylvania*.—Metzler v. Romine, 9 Pa. Co. Ct. 171, 20 Phila. 247, 47 Leg. Inf. 484.

*Tennessee*.—Ruohs v. Backer, 6 Heisk. 395, 19 Am. Rep. 598; Crockett v. McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L.R.A. 914.

*Washington*.—Abbott v. National

Canadian provinces.<sup>7</sup> Thus pertinent statements of fact have been held not to be actionable, although they charge the commission of an offense,<sup>8</sup> or are false and malicious,<sup>9</sup> or otherwise defamatory,<sup>10</sup> or libelous.<sup>11</sup> But in some jurisdictions an allegation in a pleading is not privileged unless founded upon probable cause; and, therefore, the privilege does not extend to matters known to be false.<sup>12</sup> As to the degree of relevancy or pertinency necessary to bring alleged defamatory matter within the privilege, the courts favor a liberal rule; thus it has been held that the matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety.<sup>13</sup> Much allowance should be made for the earnest, though mistaken, zeal of a litigant who seeks to redress his wrongs, and for the ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own.<sup>14</sup> While the matter alleged need not be in every case material to the issues presented by the pleadings, it must be legiti-

Bank of Commerce, 20 Wash. 552, 56 Pac. 376.

*West Virginia.*—Johnson v. Brown, 13 W. Va. 71.

<sup>7</sup> Wilkins v. Major, 22 Quebec Super. Ct. 264; Morrison v. Western Assur. Co., 24 Quebec Super. Ct. 111.

<sup>8</sup> McGehee v. Insurance Co. of North America, 112 Fed. 853, 50 C. C. A. 551; Ash v. Zwietusch, 159 Ill. 455, 42 N. E. 854, affirming 57 Ill. App. 157; Crockett v. McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L.R.A. 914.

<sup>9</sup> Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Hess v. McKee, 150 Iowa 409, 130 N. W. 375; Gaines v. Aetna Ins. Co., 104 Ky. 695, 47 S. W. 884.

<sup>10</sup> Flynn v. Boglarsky, 164 Mich. 513, 129 N. W. 674, 32 L.R.A.(N.S.) 740, 17 Det. Leg. N. 1109; Baggett v. Grady, 154 N. C. 342, 70 S. E. 618.

In Louisiana it has been held that

the attorney, and not his client, is responsible for defamatory utterances of the former in the course of the trial of the latter's cause. Monroe v. H. Weston Lumber Co., 50 La. Ann. 142, 23 So. 247.

<sup>11</sup> Kemper v. Fort, 219 Pa. St. 85, 12 Ann. Cas. 1022, 67 Atl. 991, 123 Am. St. Rep. 623, 13 L.R.A.(N.S.) 820.

<sup>12</sup> Lescale v. Joseph Schwartz Co., 116 La. 302, 40 So. 708; Charlebois v. Bourassa, 5 Montreal Super. Ct. 423; Benning v. Rielle, 6 Montreal Q. B. 365. See also Gardemal v. McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; Metzler v. Romine, 9 Pa. Co. Ct. 171, 20 Phila. 247, 47 Leg. Int. 484.

<sup>13</sup> Harlow v. Carroll, 6 App. Cas. (D. C.) 139.

<sup>14</sup> Myers v. Hodges, 53 Fla. 197, 44 So. 362.



mately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial.<sup>15</sup> The relevancy to the subject-matter of the controversy, of the matter alleged to be libelous, is a question of law for the court.<sup>16</sup> But impertinent and scandalous allegations are none the less actionable because of being inserted in a party's pleading in a pending cause.<sup>17</sup> Under the English rule statements made by a party in his pleadings are absolutely privileged and can in no case give rise to an action for defamation;<sup>18</sup> and this doctrine has been followed to some extent in this country.<sup>19</sup> So, it has been held that where alleged libelous matters are authorized by statute as expressing the grounds upon which a judicial proceeding may be insti-

<sup>15</sup> *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. 803, 48 U. S. App. 575, 28 C. C. A. 96.

<sup>16</sup> *Harlow v. Carroll*, 6 App. Cas. (D. C.) 140; *Jones v. Brownlee*, 161 Mo. 258, 61 S. W. 795, 53 L.R.A. 445; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L.R.A. 914.

<sup>17</sup> *Union Mut. L. Ins. Co. v. Thomas*, 83 Fed. 803, 48 U. S. App. 575, 28 C. C. A. 96; *Potter v. Troy*, 175 Fed. 128; *Harlow v. Carroll*, 6 App. Cas. (D. C.) 128; *Sherwood v. Powell*, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L.R.A. 153; *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L.R.A. 753.

<sup>18</sup> *Buckley v. Wood*, Cro. Eliz. (Eng.) 230; *Brown v. Michel*, Cro. Eliz. (Eng.) 500; *Revis v. Smith*, 18 C. B. 126, 86 E. C. L. 126, 2 Jur. N. S. 614, 25 L. J. C. Pl. 195, 4 W. R. 506; *Astley v. Younge*, 2 Burr. (Eng.) 807, 2 Ken. K. B. (pt. 1) 536; *Henderson v. Broomhead*, 4 H. & N. (Eng.) 569, 5 Jur. N. S. 1175, 28 L. J. Exch. 360, 7 W. R. 492.

<sup>19</sup> *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L.R.A. 417.

*In Maryland*, in *Bartlett v. Christ-hilf*, 69 Md. 219, 14 Atl. 518, the court, after discussing the English cases upon this point, said: "These authorities, and others which might be cited, hold that statements made in any of the pleadings or proceedings in a cause before a court having jurisdiction of the subject are absolutely privileged, even though made maliciously and falsely. This privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy which looks to the free and unfettered administration of justice, though as an incidental result it may, in some instances, afford an immunity to the evil disposed and malignant slanderer." However, the court said that in the case at bar it was not necessary to decide whether the privilege invoked was absolute or qualified, as the allegations complained of did have direct relation to the subject-matter brought before the court in the petition in which they were used, and therefore were privileged within either view of the matter.

tuted, they are privileged.<sup>30</sup> Thus a statutory provision to the effect that a privileged publication is one made in any legislative or judicial proceeding or in any other official proceeding authorized by law, has been construed to effect an absolute privilege in respect to matters stated in pleadings.<sup>1</sup> The liability of the attorney in this respect has been considered heretofore.<sup>2</sup>

*For Costs and Expenses.*

**§ 305. Liability for Costs Generally.** — The mere fact that an attorney has been retained to conduct a case in court will not, of itself, create a liability on his part for the payment of the costs of suit, or any part thereof.<sup>3</sup> So, an agreement entered into between an attorney and his client whereby the attorney is to pay the costs of the litigation would, in most jurisdictions, be considered void.<sup>4</sup> Liability for costs has, however, been imposed upon attorneys by statute, in certain cases, in several jurisdictions.<sup>5</sup> So it would seem that such liability may be imposed by rule of court.<sup>6</sup>

**§ 306. Because of Misconduct or Negligence.** — The court has inherent power to impose the costs upon an attorney who has

<sup>30</sup> *Wilkins v Hyde*, 142 Ind. 260, 41 N. E. 536. See also *Hodson v. Pare*, [1899] 1 Q. B. (Eng.) 455.

<sup>1</sup> *Duncan v. Atchison, etc., R. Co.*, 72 Fed. 808, 44 U. S. App. 427, 19 C. C. A. 202, (construing *California* statute); *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574; *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174. But see *Wyatt v. Buell*, 47 Cal. 624, decided before the section of the code above cited was enacted.

<sup>2</sup> See *supra*, §§ 75-78.

<sup>3</sup> *Wade v. Keefe*, 22 L. R. Ir. 154; *Ross v. Calder*, 3 U. C. Q. B. 180; *Blankenship v. Cowling*, 31 App. Cas. (D. C.) 626; *Christmas v. Russell*, 2

*Metc. (Ky.)* 112; *Richie v. Taylor*, 44 Hun 627 mem., 8 N. Y. St. Rep. 832.

<sup>4</sup> See *infra*, § 389.

<sup>5</sup> See the sections following in this subdivision.

<sup>6</sup> In *Hawaii* a rule of the circuit court provides that attorneys shall be liable for costs of court incurred by their respective clients. But the rule covers only what are strictly costs of court. They do not include "fees" or "disbursements." *Kanahale v. Wakefield*, 11 Hawaii 258. The fees of a commissioner appointed to take testimony are costs of court within the meaning of the rule. *Waikulani v. Carter*, 12 Hawaii 83.

been guilty of misconduct,<sup>7</sup> even though he appears for himself;<sup>8</sup> and in some instances costs have been imposed where counsel were only guilty of negligence.<sup>9</sup> This power is said to be necessary in

<sup>7</sup> *England*.—*Bennet v. Wade*, 2 Atk. 328; *Matter of Hogan*, 3 Atk. 813; *Thomas v. Vandermoolen*, 2 B. & Ald. 197, 20 Rev. Rep. 404; *Blundell v. Blundell*, 5 B. & Ald. 533, 7 E. C. L. 181, 1 Dowl. & R. 142; *In re Bainbrigge*, 11 Beav. 620; *Upton v. Brown*, 20 Ch. D. 731, 47 L. T. N. S. 289, 30 W. R. 817; *Aubrey v. Aspinall*, Jac. 441; *Bromage v. Davies*, 4 Jur. N. S. 683; *In re Gregg*, L. R. 9 Eq. 137, 39 L. J. Ch. 107, 23 L. T. N. S. 234, 18 W. R. 589; *Baker v. Loader*, L. R. 16 Eq. 49, 42 L. J. Ch. 113, 21 W. R. 167; *In re Dartnall*, [1895] 1 Ch. 474, 64 L. J. Ch. 341, 12 Rep. 237, 72 L. T. N. S. 404, 43 W. R. 644; *In re Armstrong*, [1896] 1 Ch. 536, 65 L. J. Ch. 258, 74 L. T. N. S. 134, 44 W. R. 281; *Seldon v. Wilde*, [1910] 2 K. B. 9, 79 L. J. K. B. 621; *Martinson v. Clowes*, 52 L. T. N. S. 706, 33 W. R. 555; *Esop v. Cuthbert*, 1 Madd. 77; *Cockle v. Whiting*, 1 Russ. & M. 43; *Cook v. Broomhead*, 16 Ves. Jr. 133; *Williams v. Jones*, 4 W. R. 99.

*Ireland*.—*Knox v. O'Brien*, 3 Ir. Eq. 62.

*Canada*.—*Brigham v. Smith*, 2 Ch. Chamb. (Ont.) 462; *Doe v. Dobson*, 7 N. Bruns. 531.

*United States*.—*Bogart v. Electrical Supply Co.*, 23 Blatchf. 552, 27 Fed. 722.

*Indiana*.—*Loveland v. Jones*, 4 Ind. 184; *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641.

*Kentucky*.—*Respass v. Morton*, Hardin 226.

*Mississippi*.—*Topp v. Pollard*, 24 Miss. 682.

*New York*.—*Britt v. Van Norden*, 1 Johns. Cas. 390; *Heyers v. Denning*, Col. & C. Cas. 75; *Britt v. Van Orden*, Col. & C. Cas. 99; *Bradt v. Walton*, 8 Johns. 298; *Baur v. Betz*, 1 How. Pr. N. S. 344, 7 Civ. Proc. 233, affirmed 99 N. Y. 672; *Attleboro Nat. Bank v. Wendell*, 64 Hun 208, 22 Civ. Proc. 225, 19 N. Y. S. 45; *In re Kelly*, 59 N. Y. 595.

*Ohio*.—*Kerr v. Chillicothe Bank*, Wright 737.

*Tennessee*.—*Sharp v. Fields*, 5 Lea 326; *Finley v. Acme Kitchen Furniture Co.*, 119 Tenn. 698, 109 S. W. 504.

<sup>8</sup> *Matter of Kelly*, 62 N. Y. 198.

<sup>9</sup> *England*.—*In re Bolton*, 9 Beav. 272, 10 Jur. 22; *Ridley v. Tiplady*, 20 Beav. 44, 24 L. J. Ch. 207, 1 Jur. N. S. 249, 3 W. R. 276; *Layton v. Wood*, 3 Jur. 124; *In re Bradford*, 15 Q. B. D. 635, 53 L. J. Q. B. 65, 50 L. T. N. S. 170, 32 W. R. 238; *Ellis v. King*, 5 Madd. 21; *Fawkes v. Pratt*, 1 P. Wms. 593; *De Rouffigny v. Peale*, 3 Taunt. 484, 12 Rev. Rep. 687; *White v. Hillacre*, 3 Y. & C. Exch. 278, 8 L. J. Exch. 65; *Wood v. Wood*, 4 Russ. 558; *In re Spencer*, 39 L. J. Ch. 841, 18 W. R. 240, 21 L. T. N. S. 808.

*Ireland*.—*Taylor v. Gorman*, Flan. & Kel. 567, 4 Ir. Eq. 550.

*Hawaii*.—*Palake v. Paakaula*, 6 Hawaii 269.

*Kentucky*.—*Respass v. Morton*, Hardin 234.

*New York*.—*Jordan v. National Shoe, etc., Bank*, 45 Super. Ct. 423; *Den v. Fen*, Col. & C. Cas. 303; *Excise Com'rs v. Purdy*, 22 How. Pr.

order that the court may protect itself against gross violations of decency and decorum, and is to be exercised as a matter of judicial discretion.<sup>10</sup> Thus an attorney who inserts impertinent or scandalous matter in pleadings may be ordered to pay the costs of having it expunged.<sup>11</sup> And by a federal statute any attorney who needlessly multiplies the proceedings in any cause may be charged with the costs thus unnecessarily made.<sup>12</sup> So, an attorney who assumes to represent a party to an action is personally liable for costs if it turns out that he acted without authority, or that his supposed client is nonexistent.<sup>13</sup> But costs will not be imposed on

312; *Kane v. Van Vranken*, 5 Paige 62.

*North Carolina*.—Ex p. Robbins, 63 N. C. 309.

<sup>10</sup> *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641.

<sup>11</sup> N. Y. Code Civ. Pro. § 545. See also *Cook v. Rosslyn*, 3 Giff. (Eng.) 175, 7 Jur. N. S. 1070, 5 L. T. N. S. 133; *Powell v. Kane*, 2 Edw. (N. Y.) 450; *Powell v. Kane*, 5 Paige (N. Y.) 265; *Cushman v. Brown*, 6 Paige (N. Y.) 539; *McVey v. Cantrell*, 8 Hun (N. Y.) 522.

<sup>12</sup> The continuation of a pending suit for infringement of a patent, and the taking of testimony therein by complainant after he has filed a petition for a reissue on the ground of the invalidity of the patent in suit, constituted a "multiplication of proceedings," so as unreasonably and vexatiously to increase the costs, within the meaning of Rev. St. § 982 (2 Fed. St. Ann. 291; U. S. Comp. St. 1901, p. 706), and on a dismissal of the suit after the granting of a reissue defendant is entitled thereunder to a special allowance commensurate with the expense occasioned thereby. *Motion Picture Patents Co. v. Yankee Film Co.*, 192 Fed. 134.

<sup>13</sup> *England*.—*Simmons v. Liberal Opinion Limited*, [1911] 1 K. B. 966, 21 Ann. Cas. 876; *In re Manby*, 3 Jur. N. S. 259, 26 L. J. Ch. 313; *Fricker v. Van Grutten*, [1896] 2 Ch. 649; *Tabbemor v. Tabbemor*, 2 Keen 679, 6 L. J. Ch. 19; *Pinner v. Knights*, 6 Beav. 174. See also *Dundas v. Duttens*, 2 Cox Ch. 236, 1 Rev. Rep. 112; *Wade v. Stanley*, 1 Jac. & W. 654.

*Canada*.—*Meyers v. Lake*, 1 Grant Ch. (U. C.) 305; *Smith v. Turnbull*, 1 Ont. Pr. 88; *Shaw v. Ormiston*, 2 Ont. Pr. 152; *Weir v. Hervey*, 1 U. C. Q. B. 430; *Henderson v. McMahon*, 12 U. C. Q. B. 288; *Fisher v. Holden*, 17 U. C. C. P. 395; *Scribner v. Parcells*, 20 Ont. 554. See also *Betta v. Chapman*, 7 N. Bruns. 450.

*Illinois*.—Anonymous, 11 Ill. 488.

*New York*.—*Cornell v. Allen*, Col. & C. Cas. 75; *People v. Bradt*, 6 Johns. 318; *Bradt v. Walton*, 8 Johns. 298; *American Ins. Co. v. Oakley*, 9 Paige 496, 38 Am. Dec. 561; *Balbi v. Duvet*, 3 Edw. 418; *Derickson v. McCordle*, 2 How. Pr. 196; *Jordan v. National Shoe, etc., Bank*, 45 Super. Ct. 423; *Deutsch v. Webb*, 10 Abb. N. Cas. 393; *Attleboro Nat. Bank v. Wendell*, 64 Hun 208, 22 Civ. Proc. 225, 19 N. Y. S. 45; *Post v. Charlesworth*, 66 Hun 256, 21 N. Y. S. 168;

counsel merely because of inadvertence,<sup>14</sup> or mistaken zeal,<sup>15</sup> or a fault resulting from inexperience,<sup>16</sup> where there is no deceit or other improper conduct.<sup>17</sup>

### § 307. Because of Representing Nonresident Litigants. —

In some jurisdictions, under statutory and court rule authority, a liability for costs is imposed upon attorneys who represent nonresident litigants.<sup>18</sup> Thus the Georgia code provides that "when any attorney shall institute a suit in any of the courts of this state for any person who resides out of this state, such attorney shall be liable to pay all costs of the officers of court in case such suit shall be dismissed, or the plaintiff be cast in his suit. When the plaintiff and his attorney both reside outside of the limits of this state,

*Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. S. 894.

*Ohio*.—*Falor v. Beery*, 8 Ohio Dec. 306, 6 Ohio N. P. 290, 7 Ohio N. P. 645.

*Pennsylvania*.—See *Paterson v. McPherson*, 32 Leg. Int. 320, 1 W. N. C. 454.

*Tennessee*.—*Sharp v. Fields*, 5 Lea 326.

*Virginia*.—*Howard v. Rawson*, 2 Leigh 733.

*Compare* *Hamilton v. Wright*, 37 N. Y. 502, where it appeared that an attorney prosecuted an action of ejectment in the name of the grantors and grantee in a deed, against a defendant in possession, and failed, and it was held that the grantors were liable for costs notwithstanding the prosecution was without their knowledge, the defendant having a right to presume a retainer. And see *supra*, § 230, as to the presumption of retainer generally.

In *Thomas v. Finlayson*, 19 W. R. (Eng.) 255, it was held that the rule that proceedings taken by a solicitor, without proper authority, would be

annulled with costs to be paid by him, did not apply unless he was aware of the circumstances which invalidated his authority, and moreover, that notice from the other side was not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were true.

*Where a solicitor employed by one of several administrators files a bill in the names of all, he will not be compelled to pay costs, although the name of a co-administratrix was inserted without her consent.* *Dare v. Allen*, 2 N. J. Eq. 288. See also *supra*, § 231, as to the right to enter an appearance for coparties and nominal parties.

<sup>14</sup> *Hauser v. Herzog*, 141 App. Div. 522, 126 N. Y. S. 337.

<sup>15</sup> *Bird v. Wessels*, 119 N. Y. S. 329.

<sup>16</sup> *In re Tacke*, 1 Con. Sur. 119, 3 N. Y. S. 431.

<sup>17</sup> *Bird v. Wessels*, 119 N. Y. S. 329.

<sup>18</sup> *Cator v. Collins*, 2 Mo. App. 225; *Reed v. Benzine-ated Soap Co.*, 72 N. J. Eq. 622, 65 Atl. 1008; *Knowles v. Frawley*, 84 Wis. 119, 54 N. W. 107.

the proper officers may demand their full costs before they shall be bound to perform any service in any cause about to be commenced by such nonresident attorney or plaintiff.”<sup>19</sup> So, under the New York code the attorney for a nonresident is liable for the defendant's costs to an amount not exceeding one hundred dollars unless his client gives security therefor.<sup>20</sup> Under this provision it has been held that it is immaterial that the attorney was retained by a resident,<sup>1</sup> or that the action was brought in the state at the request of the defendant,<sup>2</sup> or that the plaintiff was originally represented by a different attorney,<sup>3</sup> or that the defendant was guilty of laches in moving for security,<sup>4</sup> or that a motion to compel the plaintiff to give security for costs was denied,<sup>5</sup> or that an order to give security was obtained, if it was not complied with.<sup>6</sup> But the plaintiff's attorney is not liable for the defendant's costs where the plaintiff resided in the state when the suit was commenced, and removed therefrom while it was pending,<sup>7</sup> or where

<sup>19</sup> Ga. Code (1911) § 5.982. See also *Carmichael v. Pendleton*, Dud. (Ga.) 173; *Mackey v. Blake*, 15 Ga. 402; *Ross v. Harvey*, 32 Ga. 388; *Officers of Court v. Hines*, 33 Ga. 516; *Berrie v. Atkinson*, 114 Ga. 708, 40 S. E. 708.

<sup>20</sup> N. Y. Code Civ. Pro. §§ 3268, 3272, 3278. See also *Jones v. Savage*, 10 Wend. (N. Y.) 621; *Waring v. Barret*, 2 Cow. (N. Y.) 460; *People v. Marsh*, 3 Cow. (N. Y.) 334; *Balbi v. Duvet*, 3 Edw. (N. Y.) 418; *Cobb v. Robinson*, 1 How. Pr. (N. Y.) 235; *Boyce v. Bates*, 8 How. Pr. (N. Y.) 495; *Moir v. Brown*, 9 How. Pr. (N. Y.) 270; *Vincent v. Vanderbilt*, 10 How. Pr. (N. Y.) 324, 1 Abb. Pr. 193; *Willmont v. Meserole*, 48 How. Pr. (N. Y.) 430; *In re Levy*, 2 Civ. Proc. (N. Y.) 108; *Renwick v. New Central Coal Co.*, 55 Super. Ct. 444, 14 Civ. Proc. 114, 14 N. Y. St. Rep. 758.

<sup>1</sup> *Jones v. Savage*, 10 Wend. (N. Y.) 621.

<sup>2</sup> *Renwick v. New Central Coal Co.*, 55 Super. Ct. 444, 14 Civ. Proc. 114, 14 N. Y. St. Rep. 758.

<sup>3</sup> *Renwick v. New Central Coal Co.*, 55 Super. Ct. 444, 14 Civ. Proc. 114, 14 N. Y. St. Rep. 758.

<sup>4</sup> *In re Levy*, 2 Civ. Proc. (N. Y.) 108. But see *Reed v. Benzine-ated Soap Co.*, 72 N. J. Eq. 622, 65 Atl. 1008.

<sup>5</sup> *In re Levy*, 2 Civ. Proc. (N. Y.) 108.

<sup>6</sup> *Boyce v. Bates*, 8 How. Pr. (N. Y.) 495.

<sup>7</sup> *Frary v. Dakin*, 8 Johns. (N. Y.) 353; *Long v. Hall*, 3 Sandf. (N. Y.) 729; *Jackson v. Powell*, 2 Johns. Cas. (N. Y.) 67; *Alexander v. Carpenter*, 3 Denio (N. Y.) 266; *Moir v. Brown*, 9 How. Pr. (N. Y.) 270.

*Proceeding in the cause after the client's removal from the state, without the filing of security, will render the attorney liable.* *Waring v. Barret*, 2 Cow. (N. Y.) 460; *People v. Marsh*, 3 Cow. (N. Y.) 334; *Gillespie*

one of several plaintiffs resides within the state, even though he is insolvent and confined in jail for debt,<sup>8</sup> or where the client has given security for the costs;<sup>9</sup> nor does the statute apply to surrogates' courts.<sup>10</sup> Regulations of the character under discussion are in derogation of the common law and should be strictly construed;<sup>11</sup> and it has been held that the power to hold a solicitor for costs when the complainant is a nonresident will only be enforced when the defendant moves to compel the complainant to give security; if the right is waived as to the complainant, the waiver inures to the benefit of the solicitor.<sup>12</sup>

**§ 308. Because of Indorsement of Writ.**—In some jurisdictions, under statutory regulation, an attorney renders himself liable for certain costs by indorsing the original writ.<sup>13</sup> Where the writ has been indorsed by a law partnership the subsequent dissolution of the firm does not remove their liability for the costs,<sup>14</sup> but the indorsement of a writ by one of the partners in his own name does not bind his co-partner.<sup>15</sup> An attorney cannot relieve himself from the liability assumed by indorsing the

*v. Stanless*, 1 How. Pr. (N. Y.) 101; *Wright v. Black*, 2 Wend. (N. Y.) 258; *Jones v. Savage*, 10 Wend. (N. Y.) 621.

<sup>8</sup> *Pfister v. Gillespie*, 2 Johns. Cas. (N. Y.) 109.

<sup>9</sup> *Hubbard v. Gicquel*, 14 Civ. Proc. 15, 15 N. Y. St. Rep. 397.

<sup>10</sup> *Rasch's Estate*, 28 Civ. Proc. 98, 26 Misc. 459, 55 N. Y. S. 434.

<sup>11</sup> *Berrie v. Atkinson*, 114 Ga. 708, 40 S. E. 708.

<sup>12</sup> *Reed v. Benzine-ated Soap Co.*, 72 N. J. Eq. 622, 65 Atl. 1008.

<sup>13</sup> *United States*.—Anonymous, 2 Gall. 101, 1 Fed. Cas. No. 445.

*Maine*.—*Davis v. McArthur*, 3 Greenl. 27; *How v. Codman*, 4 Greenl. 79; *Strout v. Bradbury*, 5 Greenl. 313; *Skillings v. Boyd*, 10 Me. 43; *Philpot v. McArthur*, 10 Me. 127; *Harkness v. Farley*, 11 Me. 491.

*Massachusetts*.—*Chadwick v. Upton*, 3 Pick. 442; *Chapman v. Phillips*, 8 Pick. 25; *Clark v. Paine*, 11 Pick. 69; *McGee v. Barber*, 14 Pick. 212; *Wheeler v. Lynde*, 1 Allen 402; *Ruggles v. Ives*, 6 Mass. 494; *Middlesex Turnpike Corp. v. Tufts*, 8 Mass. 266; *Fairbanks v. Townsend*, 8 Mass. 450; *Talbot v. Whiting*, 10 Mass. 359; *Morrill v. Lamson*, 138 Mass. 115.

*New Hampshire*.—*Farnum v. Bell*, 3 N. H. 72; *Pettingill v. McGregor*, 12 N. H. 179; *Woods v. Blodgett*, 15 N. H. 569.

*New York*.—See *Bliss v. Otis*, 1 Denio 656.

<sup>14</sup> *Johnson v. Sprague*, 183 Mass. 102, 68 N. E. 422.

<sup>15</sup> *Davis v. Gowen*, 17 Me. 387.

writ by showing that, in so doing, he violated a rule of court.<sup>16</sup> Where an attorney's name has been unauthorizedly indorsed on the writ by another, the attorney, by knowingly prosecuting the action to trial without objection, will be considered as having ratified the indorsement, and, therefore, liable for the costs.<sup>17</sup> In order to recover against the attorney the facts must bring the liability within the language of the statute; thus in some instances liability depends on the amount of recovery.<sup>18</sup> So, it has been held that the signature of an attorney on a writ under directions to attach does not make him an indorser.<sup>19</sup>

**§ 309. Because of Beneficial Interest.** — A New York statute provided that where an action is brought, in the name of another, by a transferee of the cause of action, or by any other person who is beneficially interested therein, or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee, or other person so interested, is liable for costs, in the like cases, and to the same extent, as if he were the plaintiff; and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them. Except in a case where he could not have been lawfully directed to pay costs, personally, his disobedience of the order is a contempt of court. But this statute does not apply to a case where the person so beneficially interested is the attorney or counsel for the plaintiff, if his only beneficial interest consists of a right to a portion of the sum or property recovered, as compensation for his services in the action.<sup>20</sup> So, in the absence of statute, an attorney whose sole interest consists of an agreement whereby he is to be compensated out of the recovery, if any, in the suit, has not such a beneficial interest as will warrant the imposition of costs upon

<sup>16</sup> *Johnson v. Sprague*, 183 Mass. 102, 66 N. E. 422.

<sup>17</sup> *Booker v. Stinchfield*, 47 Me. 340.

<sup>18</sup> *Fairbanks v. Townsend*, 8 Mass. 450.

<sup>19</sup> *Gilmore v. Crosby*, 76 Me. 599.

<sup>20</sup> N. Y. Code Civ. Pro. § 3247. See

also *Bliss v. Otis*, 1 Denio (N. Y.) 656; *Eisner v. Hamel*, 6 Hun (N. Y.) 234; *Banta v. Naughton*, 44 Hun 622 mem., 7 N. Y. St. Rep. 384; *Wolcott v. Holcomb*, 31 N. Y. 125; *Voorhees v. McCartney*, 51 N. Y. 387; *Green v. Lee*, 8 N. Y. Wkly. Dig. 131.



him.<sup>1</sup> Of course, where an attorney is the real party in interest, the fact that his interest does not appear on the record would not relieve him from liability for the costs.<sup>2</sup>

§ 310. Fees and Expenses. — It has been stated heretofore that an attorney by virtue of his retainer has implied authority to incur on behalf of his client such expenses as are necessary for the proper and orderly conduct of the litigation.<sup>3</sup> The general rule is, in accordance with this view, that expense so incurred must be paid by the client, and that the attorney is not liable therefor.<sup>4</sup> Thus an attorney is not personally liable for expenses incurred, in the interest of his client, for court fees,<sup>5</sup> or for those of referees,<sup>6</sup> court officers,<sup>7</sup> examiners,<sup>8</sup> commissioners,<sup>9</sup> witnesses,<sup>10</sup> or for the service of writs and papers.<sup>11</sup> So an attorney

<sup>1</sup> *Stevens v. Sheriff*, 76 Kan. 124, 90 Pac. 799, 11 L.R.A. (N.S.) 1153; *Gulf, etc., R. Co. v. Knott*, 14 Tex. Civ. App. 158, 36 S. W. 491.

<sup>2</sup> *Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. S. 894. See also *Eisner v. Hamel*, 6 Hun (N. Y.) 234.

<sup>3</sup> See *supra*, § 252.

<sup>4</sup> *England*.—*Merriman v. Newman*, 20 W. R. 369.

*Iowa*.—*Doughty v. Paige*, 48 Ia. 483.

*Massachusetts*.—*Tarbell v. Dickinson*, 3 Cush. 345.

*Michigan*.—*Preston v. Preston*, 1 Doug. 292.

*New York*.—*Argus Co. v. Hotchkiss*, 121 App. Div. 378, 107 N. Y. S. 138.

*Vermont*.—*Sargeant v. Pettibone*, 1 Aikens 355; *Crooker v. Hutchinson*, 2 D. Chip. 117; *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284; *Russell v. Ferguson*, 77 Vt. 433, 60 Atl. 802.

<sup>5</sup> *Russell v. Ferguson*, 77 Vt. 433, 60 Atl. 802.

<sup>6</sup> *New York*.—*Howell v. Kinney*, 1

How. Pr. 105; *Dinkel v. Wehle*, 63 How. Pr. 298; *Judson v. Gray*, 11 N. Y. 408; *Geib v. Topping*, 83 N. Y. 47; *In re Malcom*, 129 App. Div. 226, 113 N. Y. S. 666, reversing 60 Misc. 324, 113 N. Y. S. 255.

<sup>7</sup> *Preston v. Preston*, 1 Doug. (Mich.) 292; *Bonyng v. Waterbury*, 12 Hun (N. Y.) 534; *Sheridan v. Genet*, 12 Hun (N. Y.) 660.

<sup>8</sup> *Watertown v. Cowen*, 5 Paige (N. Y.) 510; *Curtis v. Engle*, 4 Edw. (N. Y.) 117.

<sup>9</sup> *Lamoureux v. Morris*, 4 How. Pr. (N. Y.) 245.

<sup>10</sup> *Robins v. Bridge*, 3 M. & W. (Eng.) 114, 6 Dowl. 140, M. & H. 357; *Fendall v. Noakes*, 3 Jur. (Eng.) 726, 7 Scott 647; *Lee v. Everest*, 2 H. & N. (Eng.) 285, 26 L. J. Exch. 334; *Sargeant v. Pettibone*, 1 Aiken (Vt.) 355; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

<sup>11</sup> *Doughty v. Paige*, 48 Ia. 483.

Laws of New Hampshire 1899, ch. 20, sec. 1 (Pub. Stat. 1901, p. 686), rendering obsolete *Eastman v. Coos Bank*, 1 N. H. 23; *Towle v. Hatch*, 43

will not be responsible for the cost of printing briefs for his client,<sup>12</sup> or for the services of a stenographer,<sup>13</sup> or an accountant.<sup>14</sup> But the presumption that an attorney in incurring expense is acting for his client, may be rebutted by showing facts and circumstances from which it may fairly be inferred that the credit was extended to the attorney and not to the client;<sup>15</sup> as, for instance, where the attorney fails to disclose the party for whom he is acting;<sup>16</sup> but the fact that the indebtedness was charged to the attorney is not conclusive.<sup>17</sup> So, an attorney may render himself liable for debts contracted by him in the interest of his client by agreeing to be responsible therefor.<sup>18</sup> In some jurisdictions, however, an attorney is held to be liable for the fees of court officers who perform services at his request;<sup>19</sup> thus counsel

N. H. 273; *Joyce v. Morgan*, 66 N. H. 487, 23 Atl. 78.

<sup>12</sup> *Argus Co. v. Hotchkiss*, 121 App. Div. 378, 107 N. Y. S. 138; *Livingston-Middleditch Co. v. New York College of Dentistry*, 30 Misc. 831, 61 N. Y. S. 918, *affirmed* 31 Misc. 259, 7 N. Y. Ann. Cas. 398, 64 N. Y. S. 140; *Tyrrel v. Hammerstein*, 33 Misc. 505, 8 N. Y. Ann. Cas. 432, 67 N. Y. S. 717. *Contra* *Trimmier v. Thomson*, 41 S. C. 125, 19 S. E. 291.

<sup>13</sup> *Sheridan v. Genet*, 12 Hun (N. Y.) 660; *Bonynge v. Field*, 44 Super. Ct. (N. Y.) 581; *Bonynge v. Field*, 81 N. Y. 159.

Where an official reporter brought suit against a client for services in preparing a bill of exceptions, under a mistaken belief as to the law he could not recover from the attorney who directed the preparation of the bill of exceptions, his expenses in unsuccessfully prosecuting the suit against the client. *Bloomfield v. Nevitt*, (Colo.) 131 Pac. 801.

<sup>14</sup> *Covell v. Hart*, 14 Hun (N. Y.) 252.

<sup>15</sup> *Livingston Middleditch Co. v.*

*New York College of Dentistry*, 30 Misc. 831, 61 N. Y. S. 918, *affirmed* 31 Misc. 259, 7 N. Y. Ann. Cas. 398, 64 N. Y. S. 140. See also *Wires v. Briggs*, 5 Vt. 101, 26 Am. Dec. 284.

<sup>16</sup> *Good v. Rumsey*, 50 App. Div. 280, 63 N. Y. S. 981.

In *Gray v. Journal of Finance Pub. Co.*, 2 Misc. 260, 21 N. Y. S. 967, it was held that where an attorney, in entering into a contract with another, acts as principal, or as the agent of an undisclosed principal, he may sue for a violation of the contract.

<sup>17</sup> *George Hornstein Co. v. Crandall*, 156 Ill. App. 520.

<sup>18</sup> *Maddox v. Cranch*, 4 Har. & McH. (Md.) 343; *Cameron Sun v. McAnaw*, 72 Mo. App. 196; *Dinkel v. Wehle*, 11 Abb. N. Cas. (N. Y.) 124; *Pessano v. Eyre*, 13 Pa. Super. Ct. 157.

<sup>19</sup> *Maine*.—*Tilton v. Wright*, 74 Me. 214, 43 Am. Rep. 578.

*New York*.—*Reilly v. Tullis*, 10 Daly 283; *Reilly v. Flynn*, 10 Daly 462.

*Pennsylvania*.—*Moore v. Porter*, 13 Serg. & R. 100; *Cone v. Donaldson*, 47 Pa. St. 363.

have, in several cases, been held responsible for service fees,<sup>20</sup> and poundage.<sup>1</sup> The liability so imposed on an attorney is similar to that of a guarantor,<sup>2</sup> and it cannot, in the first instance at least, be enforced summarily.<sup>3</sup> So an attorney will, in all jurisdictions, be responsible to an officer whose fees he has collected, whether as part of the costs or otherwise.<sup>4</sup>

**§ 311. Enforcement of Liability.**—An attorney's liability for costs is usually enforced by applying to the trial court for an order to show cause why the costs shall not be paid by the attorney.<sup>5</sup> Should the order be granted, it may be enforced by attachment,<sup>6</sup> proceedings for contempt,<sup>7</sup> or suspension.<sup>8</sup> But it seems

*South Carolina.*—Benson v. Whitefield, 4 McCord L. 149.

<sup>20</sup> *England.*—Brewer v. Jones, 10 Exch. 655, 1 Jur. N. S. 240; Langridge v. Lynch, 34 L. T. N. S. 695.

*Connecticut.*—Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234.

*Maine.*—Tilton v. Wright, 74 Me. 214, 43 Am. Rep. 578.

*Massachusetts.*—Tarbell v. Dickinson, 3 Cush. 345.

*New York.*—Adams v. Hopkins, 5 Johns. 252; Ousterhout v. Day, 9 Johns. 114; Birkbeck v. Stafford, 23 How. Pr. 236, 14 Abb. Pr. 285; Judson v. Gray, 11 N. Y. 408; Campbell v. Cothran, 56 N. Y. 279, *affirming* 65 Barb. 534, 1 Thomp. & C. 70; Geib v. Topping, 83 N. Y. 46; Van Kirk v. Sedgwick, 87 N. Y. 265, *reversing* 23 Hun 37; Gadski-Tauscher v. Graff, 44 Misc. 418, 89 N. Y. S. 1019. See also Jackson v. Anderson, 4 Wend. 474.

<sup>1</sup> Adams v. Hopkins, 5 Johns. (N. Y.) 252; Jackson v. Anderson, 4 Wend. (N. Y.) 474; Campbell v. Cothran, 65 Barb. 534, 1 Thomp. & C. 70, *affirmed* in 56 N. Y. 279; Gadski-Tauscher v. Graff, 44 Misc. 418, 34 Civ. Proc. 25, 89 N. Y. S. 1019. See Attys. at L. Vol. I.—35.

also Tarbell v. Dickinson, 3 Cush. (Mass.) 345.

Poundage fees are not allowable for an arrest and imprisonment under a body execution. Bowe v. Campbell, 63 How. Pr. (N. Y.) 167, 2 Civ. Proc. 232.

<sup>2</sup> Tarbell v. Dickinson, 3 Cush. (Mass.) 350.

<sup>3</sup> Lamoreux v. Morris, 4 How. Pr. (N. Y.) 245.

<sup>4</sup> Knott v. Kirby, 10 S. D. 30, 71 N. W. 138.

<sup>5</sup> Matter of Levy, 10 Daly (N. Y.) 391; Bronson v. Freeman, 8 How. Pr. (N. Y.) 492; Matter of Levy, 2 Civ. Proc. (N. Y.) 108; Struffman v. Muller, 74 N. Y. 594.

<sup>6</sup> Bogart v. Electrical Supply Co., 27 Fed. 722; Anonymous, 2 Cow. (N. Y.) 589.

<sup>7</sup> Christmas v. Russell, 2 Metc. (Ky.) 112. See also Ex p. Robbins, 63 N. C. 309.

*Fine.*—Costs upon a motion in a special proceeding are discretionary; but they cannot be imposed upon the attorney except in the form of a fine. Bird v. Wessels, 119 N. Y. S. 329.

<sup>8</sup> Anonymous, 2 Cow. (N. Y.) 589.

that the summary manner of enforcing payment cannot be exercised against an attorney who has become surety for the litigant,<sup>9</sup> and this is especially true where such surety was not the attorney of record.<sup>10</sup>

<sup>9</sup> In *Hubbard v. Gicquel*, 14 Civ. Proc. 15, 15 N. Y. St. Rep. 397, it was held that the summary remedy allowed against the attorney of a non-resident plaintiff for the collection of costs cannot be applied, where a bond for costs was signed by the attor-

ney, and subsequently approved; for though the bond is irregular, it is not void. See also *Lamoreux v. Morris*, 4 How. Pr. (N. Y.) 245.

<sup>10</sup> *Willmont v. Meserole*, 48 How. Pr. (N. Y.) 430.

## CHAPTER XV.

### LIABILITY FOR NEGLIGENCE.

#### *In General.*

- § 312. As Dependent on Attorney's Skill, Care, and Prudence.
- 313. Attorney Not Guarantor or Insurer.
- 314. Ignorance of Law.
- 315. As to Giving Advice.
- 316. Investments and Securities.
- 317. In Preparing and Recording Written Instruments.
- 318. Attorney's Negligence Imputed to Client.

#### *In Conducting Litigation.*

- 319. In General.
- 320. Preparation and Filing of Pleadings.
- 321. Trial.
- 322. With Respect to Judgments.
- 323. As to Proceedings for the Enforcement of Judgments.
- 324. As to Attachments.
- 325. Proceedings for Review.

#### *In Collecting Claims.*

- 326. Failure to Exercise Due Care, Skill, and Diligence.
- 327. Failure Properly to Care for Fund.
- 328. Failure to Pay Over Proceeds.
- 329. Failing to Follow Instructions.
- 330. Effect of Authorizing Attorney to Exercise Discretion.

#### *In General.*

§ 312. As Dependent on Attorney's Skill, Care, and Prudence. — The general rule is that an attorney is bound to use a reasonable degree of skill, care, and prudence in the performance of his professional duties;<sup>1</sup> and, failing in this respect, he will

<sup>1</sup> *England*.—Godefroy *v.* Dalton, 6 512; Parker *v.* Rolls, 14 C. B. 691, 78 Bing. 460, 19 E. C. L. 132; Shilcock E. C. L. 691; Hart *v.* Frame, 6 Cl. & v. Passman, 7 C. & P. 289, 32 E. C. L. F. 193, 3 Jur. 547.

be responsible to his client for any injury sustained by reason of such neglect.<sup>2</sup> It is immaterial, in such case, that the attorney's

*Georgia*.—Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; O'Barr v. Alexander, 37 Ga. 195.

*Illinois*.—Stevens v. Walker, 55 Ill. 151.

*Indiana*.—Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826.

*Kansas*.—Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364.

*Kentucky*.—Humboldt Bldg. Assoc. v. Ducker, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073.

*Louisiana*.—Thompson v. Lobdell, 7 Rob. 369.

*Massachusetts*.—Caverly v. McOwen, 123 Mass. 574.

*Michigan*.—Eggleston v. Boardman, 37 Mich. 14.

*Pennsylvania*.—Enterline v. Miller, 27 Pa. Super. Ct. 463.

*Rhode Island*.—Holmes v. Peck, 1 R. I. 242.

*Texas*.—Patterson v. Frazer, 79 S. W. 1077.

*Washington*.—Isham v. Parker, 3 Wash. 756, 29 Pac. 835.

*Wisconsin*.—Malone v. Gerth, 100 Wis. 166, 75 N. W. 972.

*Where a layman induces another to deal with him* by falsely representing that he is a lawyer, he is held to just as strict a liability to the client as if he were in fact an attorney. Miller v. Whelan, 158 Ill. 544, 42 N. E. 59; Foulks v. Falls, 91 Ind. 315. Compare Wakeman v. Hazleton, 3 Barb. Ch. (N. Y.) 148.

<sup>2</sup> *United States*.—National Sav. Bank v. Ward, 100 U. S. 195, 25 U. S. (L. ed.) 621 (a leading case); Spangler v. Sellers, 5 Fed. 882. See also Ex p. Giberson, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388; Weimer

v. Sloane, 6 McLean 259, 29 Fed. Cas. No. 17,363; Marsh v. Whitmore, 21 Wall. 178, 22 U. S. (L. ed.) 482, affirming 1 Hask. 391, 16 Fed. Cas. No. 9,122.

*Alabama*.—Walker v. Goodman, 21 Ala. 647; Burkham v. Daniel, 56 Ala. 610; Teague v. Corbitt, 57 Ala. 543.

*Arkansas*.—Pennington v. Yell, 11 Ark. 227, 52 Am. Dec. 262.

*California*.—Gambert v. Hart, 44 Cal. 542.

*Georgia*.—Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; O'Barr v. Alexander, 37 Ga. 195.

*Illinois*.—Stevens v. Walker, 55 Ill. 151; Walker v. Stevens, 79 Ill. 193.

*Indiana*.—Reilly v. Cavanaugh, 29 Ind. 435; Jones v. White, 90 Ind. 255; Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826.

*Louisiana*.—Thompson v. Lobdell, 7 Rob. 369.

*Maine*.—Wilson v. Russ, 20 Me. 421.

*Maryland*.—Cochrane v. Little, 71 Md. 328, 18 Atl. 698; Watson v. Calvert Bldg. etc., Assoc., 91 Md. 25, 45 Atl. 879.

*Massachusetts*.—Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77.

*Michigan*.—Eggleston v. Boardman, 37 Mich. 14.

*Mississippi*.—Fitch v. Scott, 3 How. 314, 34 Am. Dec. 86; Grayson v. Wilkinson, 5 Smedes & M. 268.

*Missouri*.—National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561.

*Nebraska*.—Reumping v. Wharton, 56 Neb. 536, 76 N. W. 1076.

*New York*.—Jaquiss v. Hagner, 72 N. Y. 605; Von Wallhoffen v. New-

fees have not been paid,<sup>3</sup> or that his services were rendered gratuitously.<sup>4</sup> The learning, skill and ability required in any particular instance must, of course, have reference to the character of the business for which the attorney was retained,<sup>5</sup> and need not be greater than that of the average practitioner.<sup>6</sup> Ex-

combe, 10 Hun 240; Childs v. Comstock, 69 App. Div. 160, 74 N. Y. S. 643; Flynn v. Judge, 149 App. Div. 278, 133 N. Y. S. 794.

*Ohio*.—Harter v. Morris, 18 Ohio St. 492.

*Pennsylvania*.—Riddle v. Poorman, 3 Pen. & W. 224; McWilliams v. Hopkins, 4 Rawle 382; Lynch v. Com. 16 Serg. & R. 368, 16 Am. Dec. 582; Cox v. Livingston, 2 Watts & S. 103, 37 Am. Dec. 486; Young v. Lindsay, 3 W. N. C. 169; Watson v. Muirhead, 57 Pa. St. 167, 98 Am. Dec. 213; Enterline v. Miller, 27 Pa. Super. Ct. 463.

*Rhode Island*.—Holmes v. Peck, 1 R. I. 242.

*Tennessee*.—Gaar v. Hughes, 35 S. W. 1092.

*Texas*.—Fox v. Jones, 4 Willson Civ. Cas. Ct. App. § 29, 14 S. W. 1007; Patterson v. Frazer, 100 Tex. 103, 94 S. W. 324, reversing 93 S. W. 146.

*Washington*.—Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

<sup>3</sup> Eccles v. Stephenson, 3 Bibb (Ky.) 517.

*Compare* Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388, wherein it was said: "In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained, without stating specially that a retaining fee was paid. But the averment here goes further, and shows that the employment or engagement of the defendant was in consid-

eration of certain reasonable fees and rewards to be paid him. No future time is stated as having been agreed upon for the payment of the fee, and the inference must be, that it was to be paid before the services were rendered, because an attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. Therefore, the declaration averring that the fee was to be paid, should also have averred the payment, as distinctly as the performance of any other condition precedent is necessary to be stated."

<sup>4</sup> Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662; Stephens v. White, 2 Wash. (Va.) 203.

<sup>5</sup> Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

<sup>6</sup> Spangler v. Sellers, 5 Fed. 882; Gambert v. Hart, 44 Cal. 542; Bab-bitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*Rule Same as That Obtaining in Other Professional Relations*.—Attorneys are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. Citizens' Loan, etc., Assoc. v. Friedley, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

traordinary care is not required in the absence of a special contract therefor,<sup>7</sup> and some cases hold that an attorney is liable only for gross negligence or gross ignorance in the performance of his professional duties,<sup>8</sup> but these have been criticised as being in conflict with the more recent American decisions.<sup>9</sup> Negligence

<sup>7</sup> *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Strodtman v. Menard County*, 56 Ill. App. 120; *Morrison v. Burnett*, 56 Ill. App. 129. *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

A bond for the faithful performance of his duties, executed by an attorney, has no effect whatever on his liability under the law. *Humboldt Bldg. Asso. v. Ducker*, 111 Ky. 759, 64 S. W. 671.

<sup>8</sup> *England*.—*Purves v. Landell*, 12 Cl. & F. 91; *Hill v. Finney*, 4 F. & F. 616; *Pitt v. Yalden*, 4 Burr. 2060; *Parker v. Rolls*, 14 C. B. 691, 78 E. C. L. 691.

*United States*.—*Suydam v. Vance*, 2 McLean 99, 23 Fed. Cas. No. 13,657.

*Alabama*.—*Evans v. Watrous*, 2 Port. 205. Compare *Goodman v. Walker*, 30 Ala. 497, 68 Am. Dec. 134, set out below.

*Arkansas*.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

*Maine*.—*Wilson v. Russ*, 20 Me. 421.

*Michigan*.—*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*Mississippi*.—*Hoover v. Shackelford*, 23 Miss. 520.

*Rhode Island*.—*Holmes v. Peck*, 1 R. I. 242.

*Virginia*.—*Stephens v. White*, 2 Wash. 203.

<sup>9</sup> *Patterson v. Frazer*, (Tex.) 79 S. W. 1077.

In *Goodman v. Walker*, 30 Ala. 497, 68 Am. Dec. 134, the court said: "Some law writers and some adjudged cases are guilty of inaccuracy in the employment of the phrase 'gross negligence.' Our own court fell into the error in the case of *Evans v. Watrous*, 2 Port. 205. It is there said that an attorney is not liable 'unless he has been guilty of gross negligence.' In the same paragraph it is asserted that he is 'bound to use reasonable care and skill,' and the meaning attributed by the writer of that opinion to the expression 'gross negligence' is the want or absence of 'reasonable care and skill.' Thus explained, that opinion defines the true measure of an attorney's duty and liability."

Ordinary skill means that degree which men engaged in a particular art usually employ; not that which belongs to a few men only of extraordinary endowments and capacities. 1 Bell's Com. 458. Of course the degree of skill which is required rises in proportion to the value, the delicacy and the difficulty of the operation. The want of ordinary skill is ordinary negligence. Gross negligence is the absence of slight skill. If, therefore, an artisan who undertakes a piece of work which he professes to understand, is liable only for gross negligence, he is bound to bring only slight skill to its execution. which is a conclusion opposed to all



is usually a question for the jury,<sup>10</sup> but where the facts are ascertained it becomes a question for the court.<sup>11</sup>

**§ 313. Attorney Not Guarantor or Insurer.**—An attorney at law, when he enters into the employment of another as such, undertakes that he possesses, and will exercise, a reasonable amount of skill, prudence and knowledge in the course of his employment;<sup>12</sup> but there is no implied agreement, in the relation of attorney and client, that the attorney will guarantee the success of a suit or other proceeding,<sup>13</sup> or the soundness of his opinions,<sup>14</sup> or that they will be ultimately sustained by a court of last resort.<sup>15</sup> A lawyer is not an insurer;<sup>16</sup> and, in the absence of a contract providing for special liability,<sup>17</sup> he only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence and skill would commit,<sup>18</sup> and is liable only where he fails

authority. But if he is bound to employ ordinary skill, as reason and the authorities teach, he is liable for more than gross negligence, or wilful misconduct—he is liable for whatever imperfection and failure result from want of that measure of skill. *Waugh v. Shunk*, 20 Pa. St. 130, per Woodward, J.

<sup>10</sup> *England*.—*Hunter v. Caldwell*, 10 Q. B. 69, 59 E. C. L. 69, 11 Jur. 770, *affirmed* 10 Q. B. 83, 59 E. C. L. 83, 12 Jur. 285; *Reece v. Rigny*, 4 B. & Ald. 202, 6 E. C. L. 451.

*Alabama*.—*Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561.

*Arkansas*.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

*California*.—*Gambert v. Hart*, 44 Cal. 542.

*Indiana*.—*Walpole v. Carlisle*, 32 Ind. 415.

*New York*.—*Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. S. 475.

<sup>11</sup> *Gambert v. Hart*, 44 Cal. 542.

See also *Hastings v. Halleck*, 13 Cal. 203.

<sup>12</sup> See the preceding section.

<sup>13</sup> *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

<sup>14</sup> *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212.

<sup>15</sup> *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212.

<sup>16</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; *Harriman v. Baird*, 6 App. Div. 518, 39 N. Y. S. 592, *affirmed* without opinion 158 N. Y. 691, 53 N. E. 1126.

<sup>17</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

<sup>18</sup> *Citizens' Loan, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 212; *Gallaher v. Thompson*, *Wright* (Ohio) 466; *Grindle v. Rush*, 7 Ohio 123, pt. 2; *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

to do so.<sup>19</sup> He is not liable for every mistake<sup>20</sup> and error of judgment<sup>1</sup> where he acts honestly and to the best of his ability.<sup>2</sup> And

<sup>19</sup> *England*.—*Lamphier v. Phipos*, 8 C. & P. 475, 34 E. C. L. 487; *Pitt v. Yalden*, 4 Burr. 2060.

*United States*.—*Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Equitable Trust Co. v. Smith*, 77 Fed. 677, 46 U. S. App. 561, 23 C. C. A. 394; *Eberhardt v. Harkless*, 115 Fed. 816.

*Georgia*.—*Cox v. Sullivan*, 7 Ga. 148, 50 Am. Dec. 386.

*Illinois*.—*Stevens v. Walker*, 55 Ill. 151; *Walker v. Stevens*, 79 Ill. 193.

*Indiana*.—*Nickless v. Pearson*, 81 Ind. 427; *Citizens' Loan, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655, 38 N. E. 826.

*Kentucky*.—*Humboldt Bldg. Ass'n v. Ducker*, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073.

*Massachusetts*.—*Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924.

*Michigan*.—*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*Mississippi*.—*Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86.

*Nebraska*.—*Reumping v. Wharton*, 56 Neb. 536, 76 N. W. 1076.

*New York*.—*Bowman v. Tallman*, 27 How. Pr. 212; *Hatch v. Fogerty*, 33 Super. Ct. 166; *Avery v. Jacob*, 59 Super. Ct. 585 mem., 15 N. Y. S. 564.

*Ohio*.—*Gallaher v. Thompson*, Wright 466.

*Pennsylvania*.—*Lynch v. Com.*, 16 Serg. & R. 368, 16 Am. Dec. 582;

*Stephens v. Downey*, 53 Pa. St. 424; *Watson v. Muirhead*, 57 Pa. St. 161, 98 Am. Dec. 213; *Youngman v. Miller*, 98 Pa. St. 196; *Harris v. Govett*, 3 W. N. C. 560.

*Texas*.—*Morgan v. Giddings*, 1 S. W. 369.

*Virginia*.—*Tuley v. Barton*, 79 Va. 387.

<sup>20</sup> *Pitt v. Yalden*, 4 Burr. (Eng.) 2060; *Stevens v. Walker*, 55 Ill. 151; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *Malone v. Gerth*, 100 Wis. 166, 75 N. W. 972.

<sup>1</sup> *Hinckley v. Krug*, (Cal.) 34 Pac. 118; *Morrison v. Burnett*, 56 Ill. App. 129; *Breedlove v. Turner*, 9 Mart O. S. (La.) 353; *Meredith v. Woodward*, 16 W. N. C. (Pa.) 146.

<sup>2</sup> *England*.—*Swinfen v. Chelmsford*, 5 H. & N. 890.

*Alabama*.—*Jackson v. Clopton*, 66 Ala. 29.

*Indiana*.—*Hillegass v. Bender*, 78 Ind. 225.

*Kansas*.—*Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364.

*Maine*.—*Wilson v. Russ*, 20 Me. 421.

*New York*.—*In re Shanley*, 57 Misc. 8, 107 N. Y. S. 913, modified 124 App. Div. 935, 109 N. Y. S. 434.

*Pennsylvania*.—*Lynch v. Com.*, 16 Serg. & R. 368, 16 Am. Dec. 582; *In re Worrall*, 1 Del. Co. Rep. 377.

*Texas*.—*Missouri, K. & T. R. Co. v. Ferris*, 99 S. W. 896.

*Washington*.—*State v. North Shore Boom & Driving Co.*, 55 Wash. 11, 107 Pac. 196, modifying 55 Wash. 1, 103 Pac. 426.

even though he has been negligent, an attorney will only be required to answer in damages for the injuries occasioned thereby.\*

§ 314. **Ignorance of Law.**—An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses, and will exercise, the skill and learning ordinarily possessed and employed by well-informed members of his profession in the conduct of the business which he has undertaken.<sup>4</sup> Therefore, it is essential that he should know and apply those rules and principles of law which are well established and clearly defined in the elementary books, or which have been declared in judicial decisions in the jurisdiction wherein he practices, and duly reported and published for a sufficient length of time to have become known to those who exercise diligence in keeping pace with the literature of the profession;<sup>5</sup> and he will be held liable to his client for any loss resulting from the lack of this measure of professional duty and attainment.<sup>6</sup> But at-

\* *Suydam v. Vance*, 2 McLean, 99, 23 Fed. Cas. No. 13,657; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Dean v. Radford*, 141 Mich. 36, 104 N. W. 329, 12 Detroit Leg. N. 354; *Harter v. Morris*, 18 Ohio St. 492; *Johnson v. Munro*, 3 Hill L. (S. C.) 8.

<sup>4</sup> *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Citizens' Loan, Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669. And see the two preceding sections.

<sup>5</sup> *Hillegass v. Bender*, 78 Ind. 225; *Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669; *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353; *Hatch v. Fogerty*, 33 Super Ct. (N. Y.) 166; *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

<sup>6</sup> *England*.—*Williams v. Gibbs*, 6 N. & M. 788, 2 Harr. & W. 241; *Hart v. Frame*, 6 Cl. & F. 193,

3 Jur. 547. See also *Cox v. Leech*, 1 C. B. N. S. 617, 87 E. C. L. 617, 3 Jur. N. S. 442.

*Alabama*.—*Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*California*.—*Gambert v. Hart*, 44 Cal. 542.

*Illinois*.—*Stevens v. Walker*, 55 Ill. 151.

*Indiana*.—*Reilly v. Cavanaugh*, 29 Ind. 435; *Hillegass v. Bender*, 78 Ind. 225; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 145, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

*Louisiana*.—*Breedlove v. Turner*, 9 Mart. O. S. 353.

*Massachusetts*.—*Varnum v. Martin*, 15 Pick. 440.

*New York*.—*A. B.'s Estate*, Tuck. 247.

*Pennsylvania*.—*McWilliams v. Hopkins*, 4 Rawle 382; *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

torneys do not profess to know all the law, or to be incapable of error or mistake in applying it to the facts of every case; even the most skilful of the profession would hardly be able to come up to that standard.<sup>7</sup> A lawyer is neither a guarantor nor an insurer.<sup>8</sup> He cannot be held liable for entertaining and acting upon an erroneous view of the law as to questions which are new or unsettled, or as to which the average well-informed members of his profession might fairly disagree in their application of the law.<sup>9</sup> "The fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, and the construction of statutes."<sup>10</sup> An attorney cannot be charged with negli-

<sup>7</sup> *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621.

In *Montrieu v. Jefferys*, 2 C. & P. 113, 12 E. C. L. 50, the court said: "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." See also *Shilcock v. Passman*, 7 C. & P. 289, 32 E. C. L. 512; *Lanphier v. Phipos*, 8 C. & P. 475, 34 E. C. L. 487; *Crosby v. Murphy*, 8 Ir. C. L. 301; *Ahlhauser v. Butler*, 57 Fed. 121.

<sup>8</sup> See *supra*, § 313.

<sup>9</sup> *England*.—*Godefroy v. Dalton*, 6 Bing, 460, 19 E. C. L. 132; *Kemp v. Burt*, 1 N. & M. 262, 4 B. & Ad. 424, 24 E. C. L. 93.

*United States*.—*Ahlhauser v. Butler*, 57 Fed. 121; *Eberhardt v. Harkless*, 115 Fed. 816.

*Illinois*.—*Morrison v. Burnett*, 56 Ill. App. 129.

*Indiana*.—*Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 600.

*Kentucky*.—*Humboldt Bldg. Assoc. v. Ducker*, 111 Ky. 759, 64 S. W. 671.

*Louisiana*.—*Breedlove v. Turner*, 9 Mart. O. S. 353.

*Michigan*.—*Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*New York*.—*Bowman v. Tallman*, 3 Abb. Dec. 182 note, 40 How. Pr. 1; *Poucher v. Blanchard*, 86 N. Y. 256; *Patterson v. Powell*, 31 Misc. 250, 64 N. Y. S. 43, *affirmed* 56 App. Div. 624, 68 N. Y. S. 1145.

*Pennsylvania*.—*Enterline v. Miller*, 27 Pa. Super. Ct. 463.

*Tennessee*.—*Hill v. Mynatt*, 59 S. W. 163.

*Texas*.—*Morrill v. Graham*, 27 Tex. 646.

<sup>10</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585, wherein it was also said: "Frequently we find the decisions of courts of last resort in the different states directly opposed to each other upon the same questions, and resting upon the same state of facts. These

gence when he accepts, as a correct exposition of the law, a decision of the supreme court of his state,<sup>11</sup> or where he has made a mistake because of a misstatement of facts made to him by his client.<sup>12</sup> It has also been held that counsel cannot be convicted of negligence in yielding to the views of the judge presiding at the trial of the cause,<sup>13</sup> nor, it seems, can want of professional skill be predicated on an attorney's proceeding to try a cause on a theory which is sustained by the court, even though it is contrary to a principle of law.<sup>14</sup> An attorney is not bound to possess knowledge of the laws of a foreign jurisdiction and will not be liable for error due to his ignorance thereof.<sup>15</sup>

all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when employed under the usual implied contract. Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of their performance under all the circumstances in the given case, before such responsibility attaches."

<sup>11</sup> *Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482, *affirming* 1 Hask. 391, 16 Fed. Cas. No. 9,122; *Hastings v. Halleck*, 13 Cal. 203; *Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

<sup>12</sup> *Lee v. Dixon*, 3 F. & F. (Eng.) 744.

<sup>13</sup> "When a lawyer yields to the

opinion of the presiding judge, and forbears to take an exception, he cannot be convicted of a want of professional skill, professional knowledge or professional diligence." *Pearson v. Darrington*, 32 Ala. 227.

<sup>14</sup> *Avery v. Jacob*, 59 Super. Ct. 585 mem., 15 N. Y. S. 564.

<sup>15</sup> *Fenaille v. Coudert*, 44 N. J. L. 286. In this case the court said: "In assuming the employment of plaintiffs, the skill and knowledge they professed must be considered with reference to the locality of their practice. In the absence of any express declaration on the subject, they will be presumed to have held themselves out as possessing such skill and knowledge as attorneys practicing [in the state of New York] might reasonably be supposed to possess, and no more. As attorneys of New York they are not to be presumed to know the laws of a foreign state. Nor did they impliedly undertake that they had such knowledge, by accepting an employment which . . . was in terms limited to drawing a contract in all respects binding between the parties."

§ 315. **As to Giving Advice.**—In undertaking to advise a client, the attorney impliedly guarantees that he has a sufficient knowledge of the law for that purpose, and that he will use reasonable care and skill therein; should he fail in this respect he will be responsible to his client for any damage sustained by reason of such failure.<sup>16</sup> Instances of such liability frequently arise because of erroneous advice given with respect to the validity of title to property,<sup>17</sup> or in respect to the existence of incumbrances

<sup>16</sup> *United States*.—*National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621.

*Alabama*.—*Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561. See also *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*Illinois*.—*Chase v. Heaney*, 70 Ill. 268.

*Indiana*.—*Citizens' Loan Fund, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

*Iowa*.—*Thomas v. Schee*, 80 Ia. 237, 45 N. W. 539.

*Louisiana*.—*Heffner v. Wise*, 51 La. Ann. 1637, 26 So. 415.

*Maryland*.—*Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

*Minnesota*.—*Ryan v. Long*, 35 Minn. 394, 29 N. W. 51.

*Nebraska*.—*Peckinbaugh v. Quillin*, 12 Neb. 586, 12 N. W. 104.

*New York*.—*Gihon v. Albert*, 7 Paige 278; *Couse v. Horton*, 23 App. Div. 198, 49 N. Y. S. 132; *Cleveland v. Cromwell*, 110 App. Div. 82, 96 N. Y. S. 475.

<sup>17</sup> *England*.—*Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219, 2 C. & P. 238, 12 E. C. L. 107; *Whitehead v. Greetham*, 2 Bing. 464, 9 E. C. L. 483, 10 Moo. C. Pl. 183; *Ireson v. Pearman*, 3 B. & C. 799, 10 E. C. L. 232, 5 Dowl. & R. 687; *Drax v. Scroope*, 2 B. & Ad. 581,

22 E. C. L. 145, 1 Dowl. 69; *Langdon v. Godfrey*, 4 F. & F. 445.

*Ireland*.—*O'Hanlon v. Murray*, 12 Ir. C. L. 161.

*United States*.—*Page v. Trutch*, 5 Am. L. Rec. 155, 18 Fed. Cas. No. 10,668; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621.

*California*.—*Hinckley v. Krug*, 34 Pac. 118.

*Iowa*.—*Thomas v. Schee*, 80 Iowa 237, 45 N. W. 539.

*Kentucky*.—*Humboldt Bldg. Assoc. v. Ducker*, 82 S. W. 969, 26 Ky. L. Rep. 931.

*Maryland*.—*Watson v. Calvert Bldg., etc., Assoc.*, 91 Md. 25, 45 Atl. 879.

*Missouri*.—*Gilman v. Hovey*, 26 Mo. 280; *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968; *Renkert v. Title Guaranty Trust Co.*, 102 Mo. App. 267, 76 S. W. 641.

*New York*.—*Byrnes v. Palmer*, 18 App. Div. 1, 26 Civ. Proc. 382, 45 N. Y. S. 479, *affirmed* 160 N. Y. 699, 55 N. E. 1093; *Bachman v. Goldmark*, 48 Super. Ct. 549; *Gardner v. Wood*, 37 Misc. 93, 74 N. Y. S. 750.

*Oregon*.—*Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631.

*Degree of Care Required as to Title.*—In *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. S. 479, *affirmed* 160 N. Y. 699, 55 N. E. 1093, the court said:

thereon.<sup>18</sup> So, an attorney is liable in damages to his client where he neglects to advise him concerning matters which come within the scope of his duties,<sup>19</sup> or where he fraudulently gives advice to the injury of his client.<sup>20</sup> But an attorney cannot be held to war-

"It is also true that the same rule that applies to the liability of an attorney in the conduct of a litigation is applicable to his liability in examining titles. He is certainly not a guarantor that the titles to which he certifies are perfect. He is only liable for negligence or misconduct in their examination. But in determining the question of negligence on the part of an attorney in examining a title, it is necessary to bear in mind the marked difference between proper conduct in that employment and in a litigation. In a litigation a lawyer is well warranted in taking chances. To some extent litigation is a game of chance. The conduct of a lawsuit involves questions of judgment and discretion as to which even the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable. But passing titles, as a rule, is of an entirely different nature. A purchaser of real estate is entitled not only to a good, but to a marketable title, that is, a title free from reasonable doubt. (*Cambrelleng v. Purton*, 125 N. Y. 610; *Fleming v. Burnham*, 100 N. Y. 1.) In *Jordan v. Poillon*, 77 N. Y. 518, the Court of Appeals refused to compel a purchaser at a judicial sale to take title. Though the objection presented a mere question of law, the

court declined to pass upon it and determine it in the absence of parties interested who would not be concluded by the decision. It is, therefore, the duty of a conveyancer to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk and is willing to accept it. A careful lawyer might readily advise a client that he was entitled to a piece of real property, and that it was proper to bring an action for its recovery, while, at the same time, he would reject a title which involved the same question as to which he had advised a suit."

<sup>18</sup> *Hinckley v. Krug*, (Cal.) 34 Pac. 118; *Humboldt Bldg. Assoc. Co. v. Ducker*, 82 S. W. 969, 26 Ky. L. Rep. 931; *Renkert v. Title Guaranty Trust Co.*, 102 Mo. App. 267, 76 S. W. 641; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631; *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

<sup>19</sup> *Jamison v. Weaver*, 81 Ia. 212, 46 N. W. 996. *Validity of divorce. Hill v. Montgomery*, 84 Ill. App. 300, *affirmed* 184 Ill. 220, 56 N. E. 320. See also *supra*, § 155.

<sup>20</sup> See *Loeff v. Lawton*, 97 N. Y. 478. And see generally, *supra*, §§ 152-163, as to dealings between attorney and client.

*Advising False Testimony.*—An attorney would be liable for damages to his clients from his advice to one of them to testify falsely in a matter

rant the correctness of his advice on matters of law; <sup>1</sup> he is neither an insurer nor a guarantor in this respect.<sup>2</sup> Nor can liability be predicated on the mere expression of an opinion as to matters of fact, as, for instance, the probability of realizing a certain sum under a judicial sale,<sup>3</sup> or on the failure to advise his client on subjects concerning which his opinion was not sought, and of which he was unaware.<sup>4</sup> A solicitor or attorney at law is under no duty to dissuade his client from entering upon a contemplated business venture. Having concern for the latter's prosperity, the former may tender his advice in that regard, but if he fails so to do he is not chargeable with neglect.<sup>5</sup>

**§ 316. Investments and Securities.**—An attorney who agrees to invest funds for his client must use reasonable care, dili-

committed to the attorney's legal guidance. *Flynn v. Judge*, 149 App. Div. 278, 133 N. Y. S. 794, wherein the court said: "The learned [trial] court stated its view 'that to allow the perjurer himself to sue the man who advised him to commit perjury, to recover damages, would be a most monstrous proposition.' Without quarrel with the soundness of the general proposition, and without considering a germane limitation in cases of fiduciary relation, it seems to us that the learned court lost view of the purpose and bearing of the testimony. The plaintiffs were not seeking to recover damages for a perjury of one of their number, from the inciter of the perjury. They sought to recover what they had been compelled to pay on account of a breach of defendant's obligation as an attorney and counselor at law; and their contention was that as an attorney he advised one of their number to testify falsely in a matter committed to his legal guidance. This was bad or improper advice, in violation of the obligation of the defendant under his retainer,

and damage resulting therefrom might, we think, be actionable."

<sup>1</sup> *Illinois*.—*Morrison v. Burnett*, 56 Ill. App. 129.

*Indiana*.—*Citizens' Loan, etc., Assoc. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L.R.A. 669.

*Michigan*.—See *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5.

*New York*.—*Harriman v. Baird*, 6 App. Div. 518, 39 N. Y. S. 592; *Bowman v. Tallman*, 40 How. Pr. 1.

*Tennessee*.—*Hill v. Mynatt*, 59 S. W. 163.

<sup>2</sup> An attorney, who is merely asked to draw a contract of sale and for certain advice, is not, in the absence of anything wrong with the papers drawn or the advice, liable to his client for failure of the other party to make payments as agreed. *Harkness v. Caven*, 199 Pa. St. 267, 48 Atl. 1080.

<sup>3</sup> *Reumping v. Wharton*, 56 Neb. 536, 76 N. W. 1076.

<sup>4</sup> *In re Fuller*, 4 Kulp (Pa.) 479.

<sup>5</sup> *Cohn v. Heusner*, 9 Misc. 482, 30 N. Y. S. 244.



gence, and skill, in seeing that such investments are safely and prudently made, and that the client is amply secured, and he is responsible for any loss occasioned by his failure so to do.<sup>6</sup> In loaning money to another for his client, the attorney should act only for one of the parties, and if he assumes to act for both, although he may be paid by one only, he is responsible for a failure to do for each what his duty as attorney requires him to do.<sup>7</sup> But a solicitor or attorney at law who has not assumed personally to invest his client's money, and who is called upon only to lend his professional aid for the purpose of carrying his client's proposed venture into effect, by investigating the title to the property or other security constituting the subject-matter of the proposed investment, and the preparation of the necessary legal documents, assumes no responsibility for loss not occasioned by any negligence on his part; thus he would not be liable because of the insufficiency of the security.<sup>8</sup> If, however, an attorney has been employed for

<sup>6</sup> *England*.—*Langdon v. Godfrey*, 4 F. & F. 445; *Middleton v. Pollock*, 4 Ch. D. 49, 46 L. J. Ch. 39; *Birt v. Burt*, 36 L. T. N. S. 943.

*United States*.—*Page v. Trutch*, 5 Amer. Law Rec. 155, 18 Fed. Cas. No. 10,668.

*Maryland*.—*Watson v. Calvert Building & Loan Assoc.*, 91 Md. 25, 45 Atl. 879.

*New York*.—*Seiferd v. Meyer*, 93 App. Div. 615, 87 N. Y. S. 636; *Kissam v. Squires*, 102 App. Div. 536, 92 N. Y. S. 873.

*Pennsylvania*.—*Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

*Wisconsin*.—*Rogers v. Priest*, 74 Wis. 538, 43 N. W. 510.

<sup>7</sup> *Donaldson v. Haldane*, 7 Cl. & F. (Eng.) 762; *Taylor v. Blacklow*, 3 Bing. N. Cas. 235, 32 E. C. L. 100, 3 Scott 614; *Cory v. Wirth*, 21 Kan. 10; *Ryan v. Long*, 35 Minn. 394, 29 N. Y. 51; *Arnold v. Robertson*, 3 Daly (N. Y.) 298. As to represent-

ing conflicting interests generally, see *supra*, §§ 174-182.

*Duty of Attorney to Advise as against Himself*.—In *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5, an attorney engaged to lend money for a client, lent it, and took a note for the amount made to himself, which he indorsed and delivered to her. It was held that she could not recover against him under a declaration alleging that he had engaged to advise her as to all proper action necessary for her to take for her security, and complaining that he did not in fact note at maturity in order to charge advise her that she must protest the indorser.

<sup>8</sup> *Hayne v. Rhodes*, 8 Q. B. 342, 55 E. C. L. 342, 10 Jur. 71; *Cohn v. Heusner*, 9 Misc. 482, 30 N. Y. S. 244.

The mere giving of money to a solicitor for the purpose of general investment does not of itself create the relation of trustee and *cestui que*

the purpose of passing on the sufficiency of security, he would be liable for negligence or fraud in so doing.<sup>9</sup>

### § 317. In Preparing and Recording Written Instruments.

— An attorney employed to prepare a written instrument is responsible for any loss sustained by his client as the result of his negligence in so doing.<sup>10</sup> So, also, where an attorney agrees to have certain documents recorded, and neglects to do so, he will be responsible for any damage resulting from his negligence in this respect.<sup>11</sup> An attorney who undertakes to invest his client's money is liable for failing to enter of record the security taken therefor, when recording is essential to its validity or effectiveness.<sup>12</sup> But the mere fact that an attorney is employed to prepare papers which are required to be recorded, does not make it the attorney's duty to have them recorded; there must be a special undertaking for this purpose, or the original employment must be broad enough to include it.<sup>13</sup>

*trust*, and so make the solicitor liable as trustee for a deficiency in the security. *Mare v. Lewis*, 4 Ir. Eq. 219.

In *Scholes v. Brook*, 64 L. T. N. S. (Eng.) 674, *affirming* 63 L. T. N. S. 837, a firm of valuers, employed on the recommendation of plaintiff's solicitor to value certain property, were held liable for their negligence; but the solicitor was held not liable, although he pointed out to the valuers certain suspicious facts, but failed to communicate them to his client.

<sup>9</sup> *Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219.

<sup>10</sup> *Parker v. Rolls*, 14 C. B. 691, 78 E. C. L. 691; *Stein v. Kremer*, 112 N. Y. S. 1087.

In *Stannard v. Ullithorne*, 10 Bing. 491, 25 E. C. L. 212, 4 Moo. & S. 359, Tindal, C. J., said: "It may be assumed as a general principle, that an attorney, by reason of the emolument he derives from the business in which

he is employed, undertakes, and is bound to take care, that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or, at all events, that he does not do so till the consequences have been explained to him."

<sup>11</sup> *Indiana*.—*Stott v. Harrison*, 73 Ind. 17.

*New Jersey*.—*Fenaille v. Coudert*, 44 N. J. L. 290.

*New York*.—*Arnold v. Robertson*, 3 Daly 298, appeal dismissed 50 N. Y. 683; *Stuart v. Walkup*, 114 N. Y. S. 483.

*Pennsylvania*.—*Miller v. Wilson*, 24 Pa. St. 114.

*Canada*.—*Lynch v. Wilson*, 22 U. C. Q. B. 226.

<sup>12</sup> *Fenaille v. Coudert*, 44 N. J. L. 286. And see *supra*, § 316.

<sup>13</sup> *Fenaille v. Coudert*, 44 N. J. L. 286.

§ 318. **Attorney's Negligence Imputed to Client.**—It is well settled that the negligence of an attorney who acts within the scope of his authority will be imputed to his client.<sup>14</sup> Thus, in pursuance of this rule, equity will not relieve against a judgment at law on account of any neglect, inattention, unskilfulness, or mistake of the attorney of the party against whom the judgment has been rendered.<sup>15</sup> "The law exacts of attorneys diligence in their business, and will not relieve against negligence on their part.

<sup>14</sup> *Illinois*.—*Yates v. Monroe*, 13 Ill. 219; *Kern v. Strasberger*, 71 Ill. 413; *Clark v. Ewing*, 93 Ill. 572; *Gross v. Sloan*, 58 Ill. App. 302; *Hittle v. Zeimer*, 62 Ill. App. 170.

*Iowa*.—*Clark v. Stevens*, 55 Ia. 361, 7 N. W. 591.

*Maine*.—*Beale v. Swasey*, 106 Me. 35, 20 Ann. Cas. 396, 75 Atl. 134.

*Missouri*.—*Biebinger v. Taylor*, 64 Mo. 63; *Tiernan v. Richards*, 7 Mo. App. 597; *Bowman v. Field*, 11 Mo. App. 594; *Welch v. Mastin*, 98 Mo. App. 273, 71 S. W. 1090; *Parker v. Britton*, 133 Mo. App. 270, 113 S. W. 259.

*New Hampshire*.—*Morgan v. Joyce*, 66 N. H. 476, 30 Atl. 1119.

*New Jersey*.—*Leo v. Green*, 52 N. J. Eq. 1, 28 Atl. 904.

*New York*.—*Rochester Bank v. Emerson*, 10 Paige 359.

*North Carolina*.—*Boing v. Raleigh & G. R. Co.*, 88 N. C. 62.

<sup>15</sup> *United States*.—*Wynn v. Wilson*, *Hempst.* 698, 30 Fed. Cas. No. 18,116; *U. S. Bank v. Daniel*, 12 Pet. 32, 9 U. S. (L. ed.) 989; *Rogers v. Parker*, 1 *Hughes* 148, 20 Fed. Cas. No. 12,018; *Crim v. Handley*, 94 U. S. 659, 24 U. S. (L. ed.) 219; *Barhorst v. Armstrong*, 42 Fed. 2; *Cowley v. Northern Pac. R. Co.*, 46 Fed. 325; *Celina v. Eastport Sav. Bank*, 68 Fed. 401, 37 U. S. App. 164, 15 C. C. A. 495.

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*Alabama*.—*McBroom v. Somerville*, 2 Stew. 515; *Powell v. Stewart*, 17 Ala. 719; *Watts v. Gayle*, 20 Ala. 817; *Duckworth v. Duckworth*, 35 Ala. 70; *Broda v. Greenwald*, 66 Ala. 538.

*Arkansas*.—*Jamison v. May*, 13 Ark. 600; *Burton v. Hynson*, 14 Ark. 32; *Vallentine v. Holland*, 40 Ark. 338; *Scroggin v. Hammett Grocer Co.*, 66 Ark. 183, 49 S. W. 820.

*California*.—*Barnett v. Kilbourne*, 3 Cal. 327; *Borland v. Thornton*, 12 Cal. 440; *Davis v. Chalfant*, 81 Cal. 627, 22 Pac. 972; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42.

*Florida*.—*Dibble v. Truluck*, 12 Fla. 185; *Peacock v. Feaster*, 52 Fla. 565, 42 So. 889.

*Georgia*.—*Albritton v. Bird*, R. M. Charl. 93; *Smith v. Fouche*, 55 Ga. 120; *Hambrick v. Crawford*, 55 Ga. 335; *Odell v. Mundy*, 59 Ga. 641; *Augusta Mut. Loan Assoc. v. McAndrew*, 63 Ga. 490; *Sasser v. Olliff*, 91 Ga. 84, 16 S. E. 312.

*Idaho*.—*Donovan v. Miller*, 12 Idaho 600, 10 Ann. Cas. 444, 88 Pac. 82, 9 L.R.A. (N.S.) 524.

*Illinois*.—*Yates v. Monroe*, 13 Ill. 212; *Ballance v. Loomiss*, 22 Ill. 82; *Owens v. Ranstead*, 22 Ill. 161; *Albro v. Dayton*, 28 Ill. 325; *Ames v.*

But it regards attorneys as mere men, who, with the best intentions, may be mistaken in the most important affairs. They are not required to be diligent and careful beyond the capacities of human nature. If an honest, diligent attorney misunderstands the extent of his employment, he ought not to be regarded as negligent when acting in good faith upon his belief as to his duty." <sup>16</sup> So, also, there are instances wherein relief was afforded because of

*Snider*, 55 Ill. 498; *Fuller v. Little*, 69 Ill. 229; *Clark v. Ewing*, 93 Ill. 572; *Newman v. Schueck*, 58 Ill. App. 328; *Henry v. Seager*, 80 Ill. App. 172.

*Indiana*.—*Brumbaugh v. Stockman*, 83 Ind. 583; *Sharp v. Moffitt*, 94 Ind. 240; *Center Tp. v. Marion County*, 110 Ind. 579, 10 N. E. 291; *Parker v. Indianapolis Nat. Bank*, 1 Ind. App. 462, 27 N. E. 650.

*Iowa*.—*Barthell v. Roderick*, 34 Ia. 517; *Jones v. Leech*, 46 Ia. 186; *Jackson v. Gould*, 96 Ia. 488, 65 N. W. 406.

*Kentucky*.—*Patterson v. Matthews*, 3 Bibb 80; *Barrow v. Jones*, 1 J. J. Marsh. 471; *Payton v. McQuown*, 97 Ky. 757, 31 S. W. 874, 53 Am. St. Rep. 437, 31 L.R.A. 33; *Louisville, etc., R. Co. v. Paynter*, 125 Ky. 520, 101 S. W. 935.

*Maryland*.—*Ruppertsberger v. Clark*, 53 Md. 402.

*Massachusetts*.—*Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570.

*Mississippi*.—*McLaughlin v. Clark*, Freem. Ch. 385; *Webster v. Skipwith*, 26 Miss. 341; *Carter v. Lyman*, 33 Miss. 171; *Newman v. Morris*, 52 Miss. 402.

*Missouri*.—*Dunn v. Hansard*, 37 Mo. 199; *Miller v. Bernecker*, 46 Mo. 194; *Matthis v. Cameron*, 62 Mo. 504; *Ketchum v. Harlowe*, 84 Mo. 225; *Fears v. Riley*, 148 Mo. 49, 49 S. W.

836; *Bowman v. Field*, 9 Mo. App. 576, 11 Mo. App. 594; *Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845.

*Nebraska*.—*Funk v. Kansas Mfg. Co.*, 53 Neb. 450, 73 N. W. 931; *Tootle-Weakley Millinery Co. v. Billingsley*, 74 Neb. 531, 105 N. W. 85.

*New Hampshire*.—*Butler v. Morae*, 66 N. H. 429, 23 Atl. 90.

*North Carolina*.—*Fentress v. Robins*, 4 N. C. 610, 7 Am. Dec. 704.

*Ohio*.—*White v. U. S. Bank*, 6 Ohio 529.

*South Carolina*.—*O'Keefe v. Rice*, Bailey Eq. 179; *Vaughan v. Hewitt*, 17 S. C. 442.

*Tennessee*.—*Morton v. Nunnally*, 3 Hayw. 210; *Click v. Gillespie*, 4 Hayw. 5; *Chester v. Apperson*, 4 Heisk. 639; *Graham v. Roberts*, 1 Head 56.

*Texas*.—*Avocato v. Dell'Ara*, 91 S. W. 830.

*Vermont*.—*Warner v. Conant*, 24 Vt. 351, 58 Am. Dec. 178.

*Virginia*.—*Richmond Enquirer Co. v. Robinson*, 24 Grat. 548; *Ayres v. Morehead*, 77 Va. 586.

*Wisconsin*.—*Farmers' L. & T. Co. v. Walworth County Bank*, 23 Wis. 249; *Hiles v. Mosher*, 44 Wis. 601.

<sup>16</sup> *Buena Vista County v. I. F. & S. C. R. Co.*, 49 Ia. 657; *Kirk v. Gover*, 96 S. W. 824, 29 Ky. L. Rep. 1046. See also *Day v. Wells*, 31 Conn. 344.

the insolvency of the attorney whose negligence was responsible for the entry of a judgment by default against his client.<sup>17</sup>

### *In Conducting Litigation.*

§ 319. **In General.** — The rules heretofore stated with reference to an attorney's liability to his client for negligence generally,<sup>18</sup> apply with equal force to negligence in the conduct of legal proceedings. The general rule is that an attorney who undertakes to conduct litigation, impliedly contracts to exercise due care, skill and knowledge of the law in the transaction of his client's business,<sup>19</sup> and his negligence in that regard is a breach of his contract.<sup>20</sup> Thus an attorney is *prima facie* liable in damages to his client for a loss occasioned by his neglect to bring suit within the time limited by statute,<sup>1</sup> or by his neglect to deposit service fees,<sup>2</sup> or for neglecting to notify his client of the giving of insufficient security by the adverse party,<sup>3</sup> or for ignoring notice of motions to be made in the cause.<sup>4</sup> So an attorney employed to defend a suit is liable in damages for his failure or neglect to do so,<sup>5</sup> providing, of course, that his client has informed him as to the

<sup>17</sup> *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Meacham v. Dudley*, 6 Wend. (N. Y.) 514; *Huebschman v. Baker*, 7 Wis. 542.

<sup>18</sup> See *supra*, §§ 312-318.

<sup>19</sup> *Rooker v. Bruce*, 45 Ind. App. 57, 90 N. E. 86.

<sup>20</sup> *Castner v. Gray*, (Colo.) 131 Pac. 404; *Walpole v. Carlisle*, 32 Ind. 415; *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Rooker v. Bruce*, 45 Ind. App. 57, 90 N. E. 86; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524; *Childs v. Comstock*, 69 App. Div. 160, 74 N. Y. S. 643.

<sup>1</sup> *Drury v. Butler*, 171 Mass. 171, 50 N. E. 527; *Moore v. Juvenal*, 92 Pa. St. 484; *Fox v. Jones*, 4 Willson

Civ. Cas. Ct. App. (Tex.) § 29, 14 S. W. 1007.

<sup>2</sup> *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814.

<sup>3</sup> *McWilliams v. Hopkins*, 4 Rawle (Pa.) 382.

<sup>4</sup> *Manufacturers' Paper Co. v. Lindblom*, 80 Ill. App. 267.

<sup>5</sup> *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268.

*Persuading Client Not to Put in Meritorious Defense.*—In *Hill v. Finney*, 4 F. & F. (Eng.) 616, one A. having been sued for a divorce by his wife, employed an attorney to defend him, telling him he had a good defense, and would consent to a compromise verdict provided no evidence should be taken in the case. The attorney advised him to consent to the

nature of his defense.<sup>6</sup> If, however, the defense proposed by the client was not a good one, or not available, the attorney's liability, if any, would only be nominal.<sup>7</sup> But attorneys are neither guarantors nor insurers,<sup>8</sup> and in order to recover against them on the charge of negligence, the elements thereof must be alleged and established.<sup>9</sup> In this connection it must be remembered that attorneys have more extensive powers in conducting litigation than in the performance of other professional duties.<sup>10</sup> The right of an attorney to terminate his relations with a client for cause has been considered heretofore.<sup>11</sup>

**§ 320. Preparation and Filing of Pleadings.** — It is the duty of an attorney to prepare, file, and cause to be served when necessary, all such pleadings as are essential properly to present his client's cause for the consideration of the court; and he renders himself liable for any loss or injury which his client has sustained in consequence of his failure so to do.<sup>12</sup> But an attorney does not

compromise, and had him stay away from the trial; as a consequence, the wife's evidence was introduced and was not contradicted, though A had evidence to overthrow it. A then sued his attorney, alleging that such evidence, going uncontradicted, had damaged him. It was held that if he was induced not to defend, in consideration of the fact that no evidence would be adduced against him, the attorney was liable as for gross negligence.

<sup>6</sup> *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268; *Benton v. Craig*, 2 Mo. 198.

*That the client failed to appear* when her case was called and did not furnish her counsel with a list of witnesses, and failed to appear for trial, did not warrant her counsel in abandoning her defense without having previously given her timely notice of his intention so to do. *Brown v. Green*, 132 La. 1090, 62 So. 154.

<sup>7</sup> *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268.

<sup>8</sup> See *supra*, § 313.

<sup>9</sup> *Boynton v. Brown*, 103 Ark. 513, 145 S. W. 242; *Lane v. Storke*, 10 Cal. App. 347, 101 Pac. 937; *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Jaquiss v. Hagner*, 72 N. Y. 605; *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75; *Avery v. Jacob*, 59 Super. Ct. 585 mem., 15 N. Y. S. 564; *Youngman v. Miller*, 98 Pa. St. 196; *Stephens v. White*, 2 Wash. (Va.) 203.

<sup>10</sup> See *supra*, §§ 246-252.

<sup>11</sup> See *supra*, § 139.

<sup>12</sup> *England*.—*Hunter v. Caldwell*, 10 Q. B. 69, 59 E. C. L. 69, 11 Jur. 770, affirmed 12 Jur. 285.

*Canada*.—*Kenen v. Hill*, 38 N. Bruns. 342.

*Alabama*.—*Walker v. Goodman*, 21 Ala. 647.

guarantee the sufficiency of every pleading prepared by him or under his directions; he is responsible to his client only for those mistakes which indicate a lack, on his part, of the attainments and diligence commonly possessed and exercised by legal practitioners of ordinary skill and capacity;<sup>13</sup> nor does the mere fact that a complaint proves to be demurrable show that the attorney who prepared it was incompetent or negligent.<sup>14</sup> An attorney should not be held liable for defective pleadings prepared and filed by other counsel,<sup>15</sup> unless, of course, he was employed to examine the pleadings, or to take entire charge of the cause, and had sufficient time to inspect the pleadings, and to remedy defects therein, before going to trial. In such instances it would seem that an attorney would be liable if loss resulted from his failure to exercise due care and diligence in this respect.<sup>16</sup> An attorney cannot be held liable for failure to plead the statute of limitations where an order of court requires an answer to the merits.<sup>17</sup> The exclusiveness of an attorney's authority with respect to the preparation of pleadings has been considered heretofore.<sup>18</sup>

§ 321. Trial. — It is the duty of an attorney who has been retained to conduct the trial of a cause for either party, to be prepared for this purpose when the trial is called.<sup>19</sup> He is re-

*California*.—*Gambert v. Hart*, 44 Cal. 542.

*Indiana*.—*Walpole v. Carlisle*, 32 Ind. 415.

*Kansas*.—*Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374.

*Louisiana*.—*Thompson v. Lobdell*, 7 Rob. 369.

*Massachusetts*.—*Varnum v. Martin*, 15 Pick. 440.

*Pennsylvania*.—*McWilliams v. Hopkins*, 4 Rawle 382.

<sup>13</sup> *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75. And see *supra*, § 313.

<sup>14</sup> *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. S. 75.

<sup>15</sup> *Lowry v. Guilford*, 5 C. & P. 234, 24 E. C. L. 295; *Fray v. Foster*, 1 F.

& F. (Eng.) 681. See also *Stephens v. White*, 2 Wash. (Va.) 203.

<sup>16</sup> See generally *supra*, § 312.

<sup>17</sup> *Thompson v. Dickinson*, 159 Mass. 210, 34 N. E. 262.

<sup>18</sup> See *supra*, §§ 247, 248, 249.

<sup>19</sup> *Mercer v. King*, 1 F. & F. (Eng.) 490; *Reece v. Righy*, 4 B. & Ald. 202, 6 E. C. L. 451. See also *Hatch v. Lewis*, 2 F. & F. (Eng.) 467, 7 H. & N. 367, 7 Jur. N. S. 1085.

*Under the English practice*, an attorney prepares the case for trial, and turns it over to an advocate or counsel to conduct the trial. Where an attorney fails to hand over his briefs to counsel in time, in consequence of which the latter is unprepared and the client suffers a non-

quired to be in attendance and personally to supervise every step of the proceeding;<sup>20</sup> but where two or more attorneys are engaged, and the contract does not require all of them to be present at the trial and participate therein, they may agree, on consultation, that some of their number need not attend.<sup>1</sup> The trial must be conducted with that reasonable degree of care, skill, diligence and learning which is to be expected from the average lawyer, and which has been considered heretofore;<sup>2</sup> and, failing in this respect, the attorney must answer in damages to the extent of his client's loss.<sup>3</sup> It has been held that an attorney is not necessarily negligent in permitting an incompetent witness to testify,<sup>4</sup> or in failing to take an exception to an erroneous ruling.<sup>5</sup>

**§ 322. With Respect to Judgments.** — It is the duty of an attorney to take all such steps as may be necessary for the due entry and enrolment of a judgment to which his client is entitled; and his neglect of such duty will render him liable for any loss sustained by the client.<sup>6</sup> So, an attorney is bound to obtain judgment before the debtor's property is encumbered, where by the exercise of reasonable skill and diligence he can do so.<sup>7</sup> An attorney is also liable for any loss occasioned by confessing judgment

suit, the court will grant a new trial, but will compel the attorney to pay all the costs made necessary by such proceeding. *De Rouffigny v. Peale*, 3 Taunt. 484; *Townley v. Jones*, 8 C. B. N. S. 289, 98 E. C. L. 289; *Hawkins v. Harwood*, 4 Exch. 503, 7 Dowl. & L. 181.

<sup>20</sup> *Holy v. Built*, 3 B. & Ad. 350, 23 E. C. L. 91. See also *Mordecai v. Solomon*, Say. (Eng.) 172; *Cresswell v. Bryon*, 14 Ves. Jr. (Eng.) 272.

<sup>1</sup> *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801. See also *Rust v. Larue*, 4 Litt. (Ky.) 416, 14 Am. Dec. 172; *Eggleston v. Boardman*, 37 Mich. 19.

<sup>2</sup> See *supra*, §§ 312, 314.

<sup>3</sup> *Reece v. Righy*, 4 B. & Ald. 202, 6 E. C. L. 451; *Swannell v. Ellis*, 1

Bing. 347, 8 E. C. L. 542, 8 Moo. C. Pl. 340; *Godefroy v. Jay*, 7 Bing. 413, 20 E. C. L. 183; *Drais v. Hogan*, 50 Cal. 121; *Skillen v. Wallace*, 36 Ind. 319; *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268.

<sup>4</sup> *Garsed v. Boyd*, 12 W. N. C. (Pa.) 16. See also *Breedlove v. Turner*, 9 Mart. O. S. (La.) 354.

<sup>5</sup> *Pearson v. Darrington*, 32 Ala. 227.

<sup>6</sup> *Brown v. Bulkley*, 14 N. J. Eq. 451; *Griggs v. Drake*, 21 N. J. L. 169. See also *Farrand v. Land & River Imp. Co.*, 86 Fed. 393, 58 U. S. App. 559, 30 C. C. A. 128.

<sup>7</sup> *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.



against his client without authority,<sup>8</sup> or for the violation of instructions as to the entry of such judgment.<sup>9</sup> While an attorney has a large discretionary power in the control of judgments in favor of his client,<sup>10</sup> and may in some instances agree to a vacation thereof,<sup>11</sup> or to the entry of a remittitur,<sup>12</sup> his conduct in this respect should be in the interest of his client, excepting, perhaps, where that interest would conflict with his obligations as an officer of the court, and the due administration of justice.<sup>13</sup> An attorney would undoubtedly be liable to his client for any loss caused by his unauthorized or negligent allowance of the vacation or opening of a judgment,<sup>14</sup> or for the compromise or release thereof,<sup>15</sup> or for negligently permitting a judgment to be recovered against his client.<sup>16</sup> So, after judgment has been duly entered, an attorney is, in most states, impliedly authorized to proceed for the enforcement thereof,<sup>17</sup> and liability may be predicated on his failure to do so.<sup>18</sup> But, in some jurisdictions, the rule that an attorney's implied authority ends with the entry of final judgment still prevails; and, of course, in those instances he could not be held liable for failure to proceed with the collection of the judgment unless he was retained for that purpose.<sup>19</sup> It has been held that, in the absence of a special agreement, an attorney's duty does not extend to the preservation of judgments.<sup>20</sup>

<sup>8</sup> *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Cyphert v. McClune*, 22 Pa. St. 195; *Jones v. Williamson*, 5 Cold. (Tenn.) 371.

As to an attorney's authority to confess or consent to the entry of judgment, see *supra*, §§ 268-270.

<sup>9</sup> *Thompson v. Pershing*, 86 Ind. 303.

<sup>10</sup> See *supra*, §§ 268-280.

<sup>11</sup> See *supra*, § 272.

<sup>12</sup> See *supra*, § 273.

<sup>13</sup> See *supra*, § 284.

<sup>14</sup> *Clusman v. Merkel*, 8 Bosw. (N. Y.) 402.

<sup>15</sup> As to liability for unauthorized acts generally, see *supra*, §§ 288-291. As to the right of an attorney to compromise or release his client's claims,

see *supra*, §§ 215-228, 274.

<sup>16</sup> *Newman v. Schueck*, 58 Ill. App. 328; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374.

As to equitable relief where judgments have been entered against a party through the negligence or mistake of his attorney, see *supra*, §§ 244, 245.

<sup>17</sup> See *supra*, §§ 142, 276-280.

<sup>18</sup> *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 1 Vt. 73.

<sup>19</sup> See *supra*, §§ 142, 276-280.

<sup>20</sup> *McKowen v. Kernan*, 35 La. Ann. 331; *Cook v. Foster*, (Pa.) 6 Atl. 150.

**§ 323. As to Proceedings for the Enforcement of Judgments.** — An attorney is also liable to his client for any loss resulting from his negligence in the enforcement of a judgment;<sup>1</sup> thus when an attorney acquiesces in a mistake made by the sheriff, and directs further proceedings founded thereon, he makes the error his own, and is answerable for the loss to his client arising from such proceedings;<sup>2</sup> but he would not be responsible for the officer's mistake if he had not acquiesced therein.<sup>3</sup> Ordinarily, however, an attorney's duties with respect to the enforcement of judgments are fully performed when he causes proper process for this purpose to be placed in the hands of the officer whose duty it is to execute it, and has given such instructions as are necessary for the guidance of such officer. The attorney need not attend personally to the levy or sale under such process;<sup>4</sup> nor does the general duty of an attorney require him to search for property which may have been fraudulently disposed of, or to institute new and collateral proceedings with reference to such property.<sup>5</sup> So, negligence cannot be predicated on an attorney's failure to levy an execution where it appears that the judgment debtor had no property which would have been subject thereto.<sup>6</sup> The authority of an attorney with respect to the enforcement of judgments has been considered heretofore.<sup>7</sup>

**§ 324. As to Attachments.** — The rules heretofore stated<sup>8</sup> apply also to attachments. Thus an attorney who releases an attachment without the consent of his client is liable for the damage caused thereby.<sup>9</sup> So it has been held that an attorney, charged with the collection of a demand, having procured an attachment to be made of the debtor's property, which was replevied from

<sup>1</sup> Phillips v. Bridge, 11 Mass. 246; Enterline v. Miller, 27 Pa. Super. Ct. 463.

<sup>2</sup> Enterline v. Miller, 27 Pa. Super. Ct. 463.

<sup>3</sup> Enterline v. Miller, 27 Pa. Super. Ct. 463.

<sup>4</sup> Williams v. Reed, 3 Mason 405, 29 Fed. Cas. No. 17,733; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec.

262; Gaines v. Becker, 7 Ill. App. 315. See also Holmes v. Peck, 1 R. I. 242.

<sup>5</sup> Morgan v. Giddings, (Tex.) 1 S. W. 369.

<sup>6</sup> Siddall v. Haight, 132 Cal. 320, 64 Pac. 410.

<sup>7</sup> See *supra*, §§ 276-280.

<sup>8</sup> See *supra*, § 312 et seq.

<sup>9</sup> Walker v. Goodman, 21 Ala. 647.

the possession of the officer making the attachment, is bound to act as attorney in the defense of the replevin suit, and is responsible for his negligence therein.<sup>10</sup> But the mere employment of an attorney to collect a claim imposes no duty on him to execute an affidavit and bond in attachment for his client.<sup>11</sup>

**§ 325. Proceedings for Review.** — As a general rule, the implied authority of an attorney ends with the entry of a final judgment in the trial court; and, while there are some exceptions to this rule,<sup>12</sup> and some courts recognize an attorney's power to prosecute appeal or error without special authority to do so,<sup>13</sup> it has been held that he will not be held liable for failure to take proceedings for the review of a cause unless he has been directed, and has agreed, to do so.<sup>14</sup> Where he has been retained for this purpose, however, it is the attorney's duty to take all proper steps to bring the cause before the appellate court, and his failure to do so will render him liable for any loss suffered by his client as a consequence thereof.<sup>15</sup>

### *In Collecting Claims.*

**§ 326. Failure to Exercise Due Care, Skill and Diligence.** — An attorney to whom claims have been intrusted for collection must exercise the same reasonable degree of care, skill and diligence as is required in the performance of other professional duties;<sup>16</sup> and if he neglects to do so, he will be liable to his client to the extent of the loss sustained by reason of such negligence.<sup>17</sup>

<sup>10</sup> *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39.

<sup>11</sup> *Foulks v. Falls*, 91 Ind. 315.

<sup>12</sup> See *supra*, § 142.

<sup>13</sup> See *supra*, §§ 281-283.

<sup>14</sup> *Hey v. Simon*, 93 S. W. 50, 29 Ky. L. Rep. 315.

<sup>15</sup> *Drais v. Hogan*, 50 Cal. 121; *Rosebud Min., etc., Co. v. Hughes*, 16 Colo. App. 162, 64 Pac. 247; *Childs v. Comstock*, 69 App. Div. 160, 74 N. Y. S. 643.

Where a solicitor is relied on to

perfect an appeal, counsel engaged in the same case are not liable. *Cornelissen v. Ort*, 132 Mich. 294, 93 N. W. 617.

<sup>16</sup> See *supra*, §§ 312-318.

<sup>17</sup> *England*.—*Kemp v. Burt*, 4 B. & Ad. 424, 24 E. C. L. 93; *Williams v. Gibbs*, 5 Ad. & El. 208, 31 E. C. L. 317.

*Alabama*.—*Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*Arkansas*.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

It is immaterial that the loss was occasioned by the negligence of a partner or other person who subsequently acted for the attorney in the transaction of the business.<sup>18</sup> Thus the attorney will be liable for negligence in failing to sue out the necessary process<sup>19</sup> and place it in the hands of the proper officer,<sup>20</sup> or to bring suit,<sup>1</sup> or to pursue bail,<sup>2</sup> or to take any other step essential to the accomplishment of the purpose of his employment.<sup>3</sup> So, an attorney

*California*.—*Drais v. Hogan*, 50 Cal. 121.

*Georgia*.—*Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

*Illinois*.—*Stevens v. Walker*, 55 Ill. 151.

*Indiana*.—*Reilly v. Cavanaugh*, 29 Ind. 435 (taking judgment on insufficient service); *Foulks v. Falls*, 91 Ind. 315.

*Kentucky*.—*Eccles v. Stephenson*, 3 Bibb 517; *Townsend v. Ditto*, 6 Ky. L. Rep. 290.

*Louisiana*.—*McMicken v. Brent*, 6 Mart N. S. 249; *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814.

*Maine*.—*Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39; *Wilson v. Russ*, 20 Me. 421.

*Massachusetts*.—*Varnum v. Martin*, 15 Pick. 440; *Wilson v. Coffin*, 2 Cush. 316; *Dearborn v. Dearborn*, 15 Mass. 316.

*Mississippi*.—*Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86.

*New York*.—*Smedes v. Elmendorf*, 3 Johns. 185.

*Pennsylvania*.—*Cox v. Livingston*, 2 Watts & S. 103, 37 Am. Dec. 486; *Riddle v. Poorman*, 3 Pen. & W. 224; *Waln v. Beaver*, 161 Pa. St. 605, 29 Atl. 114, 493.

*South Carolina*.—*Hogg v. Martin*, Riley L. 156.

*Tennessee*.—*Gaar v. Hughes*, 35 S. W. 1092.

*Texas*.—*Oldham v. Sparks*, 28 Tex.

425; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App. § 29, 14 S. W. 1007.

*Vermont*.—*Crooker v. Hutchinson*, 2 D. Chip. 117.

*Virginia*.—*Rootes v. Stone*, 2 Leigh 650; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

*Wisconsin*.—*Ott v. Hood*, 152 Wis. 97, 139 N. W. 762.

<sup>18</sup> See *supra*, §§ 292-294.

<sup>19</sup> *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

<sup>20</sup> *Phillips v. Bridge*, 11 Mass. 246.

<sup>1</sup> *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86.

*Collateral Suits*.—Where the attorney undertakes the collection of a debt, it does not become his duty to institute collateral suits against the sheriff for failure of duty in the service of process, without special instructions so to do. *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

<sup>2</sup> *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 1 Vt. 73.

<sup>3</sup> *Harrington v. Binns*, 3 F. & F. (Eng.) 942; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Read v. Patterson*, 11 Lea (Tenn.) 430; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App. (Tex.) § 29, 14 S. W. 1007.

who accepts depreciated money is liable to his client for the loss sustained; <sup>4</sup> and he must pay his client in specie, if it is demanded, notwithstanding that he was paid in paper money.<sup>5</sup> But in the absence of a special agreement to that effect,<sup>6</sup> an attorney does not guarantee or insure the collection of claims placed in his hands; <sup>7</sup> if he acts in good faith, to the best of his skill, and with a reasonable degree of care and diligence, he is not responsible for failure to collect.<sup>8</sup> So, an attorney who receives and holds a claim for the convenience of the owner, and for the purpose only of receiving and paying over the money paid thereon, no compensation being charged or received, cannot be held responsible in case the debt is barred by limitation.<sup>9</sup>

*Where an attorney is himself the indorser on a note* placed in his hands for collection, he is bound to take judgment promptly against both the maker and himself. And if by delay the right to judgment against himself is lost, and judgment secured against the maker only, he is liable for all that cannot be collected out of the judgment against the maker. *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

*Extraordinary Remedies.* — One who, although not an attorney, receives a claim for collection and gives a receipt "for collection" for it, assumes the liabilities of an attorney as to diligence, but he is not liable for having failed to pursue the extraordinary remedy of attachment, the owner of the claim having neither made affidavit nor given bond. *Foulks v. Falls*, 91 Ind. 315.

<sup>4</sup> *Botts v. Crenshaw*, Chase 224, 3 Fed. Cas. No. 1,690; *West v. Ball*, 12 Ala. 340; *Van Vacter v. Brewster*, 1 Smedes & M. (Miss.) 400; *Pidgeon v. Williams*, 21 Grat. (Va.) 251.

<sup>5</sup> *Wickliffe v. Davis*, 2 J. J. Marsh. (Ky.) 69; *Lord v. Burbank*, 18 Me. 178.

<sup>6</sup> *Morrill v. Graham*, 27 Tex. 646; *Gregory v. Gleed*, 33 Vt. 405.

<sup>7</sup> *Bougher v. Scobey*, 23 Ind. 583; *Kuhn v. Hunt*, 2 Brev. (S. C.) 164; *Tuley v. Barton*, 79 Va. 387. And see *supra*, § 313.

<sup>8</sup> *United States*.—*Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482.

*Alabama*.—*Stubbs v. Beene*, 37 Ala. 627; *Moore v. Winston*, 66 Ala. 296. *Georgia*.—*Nisbet v. Lawson*, 1 Ga. 275.

*Indiana*.—*Bougher v. Scobey*, 23 Ind. 583; *Nickless v. Pearson*, 81 Ind. 427; *Nickless v. Pearson*, 84 Ind. 602.

*Louisiana*.—*Hughes v. Boyce*, 2 La. Ann. 803.

*Maine*.—*Odlin v. Stetson*, 17 Me. 244, 35 Am. Dec. 248; *Wilson v. Russ*, 20 Me. 421.

*South Carolina*.—*Wright v. Ligon*, Harp. Eq. 166.

*Tennessee*.—*Read v. Patterson*, 11 Lea 430.

*Texas*.—*Morgan v. Giddings*, 1 S. W. 369.

*Virginia*.—*Tuley v. Barton*, 79 Va. 387; *Staples v. Staples*, 85 Va. 76, 7 S. E. 199.

<sup>9</sup> *McAdoo v. Lummis*, 43 Tex. 227.

§ 327. **Failure Properly to Care for Fund.** — The rule, heretofore considered, to the effect that attorneys must exercise reasonable care, diligence, and skill in the execution of business intrusted to their professional management,<sup>10</sup> applies with respect to the care of money collected for the client. Money so collected belongs to the client. It has been said that the attorney occupies toward such money the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund, and that the circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee.<sup>11</sup> So, in some cases, the attorney's duties and liabilities in this respect are said to resemble those of an agent; and there are also authorities which distinguish attorneys from both agents and trustees. There is, however, no apparent necessity for making distinctions of this character. An attorney at law, following his calling, acts as an officer of the court, and the law places upon his conduct toward his client a sufficient responsibility to make him answerable as such, irrespective of the similarity of his duties with those who act in other fiduciary capacities. It is well settled that the attorney must exercise due care for the safe-keeping of his client's money, and if, in so doing, it is considered necessary or prudent to deposit the fund in bank, the attorney fulfils his duty only by using reasonable care and prudence in the selection of such depository, and by making the deposit in the name of his client, or in his own name as attorney for the client,<sup>12</sup> and notifying his

<sup>10</sup> See *supra*, § 312 et seq. See also *Gaar, Scott & Co. v. Hughes*, (Tenn.) 35 S. W. 1092.

<sup>11</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61, wherein it was also said that whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the *cestui que trust* has his election, either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. See also, supporting

the same rule, *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28, R. & M. 274, 21 E. C. L. 438; *Gilbert v. Welsch*, 75 Ind. 557.

*Acting in Dual Capacity.*—If a party acts for another as solicitor and as trustee, and receives money in the latter capacity, it is not by operation of law *eo instante* transferred to his hands as solicitor. *Scott v. State*, 2 Md. 284.

<sup>12</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; *Pidgeon v. Williams*, 21 Grat. (Va.) 251. And see *Palmer v. Ashley*, 3 Ark. 75.

client of that fact with reasonable diligence;<sup>13</sup> although formal notice may be excused if the client has actual knowledge of the deposit; so, an attorney cannot be held liable for failure to notify a client whose whereabouts are unknown or inaccessible.<sup>14</sup> A *bona fide* compliance with this rule will protect the attorney notwithstanding the subsequent failure of the bank.<sup>15</sup> An attorney should not mingle his client's money with his own,<sup>16</sup> nor should such money be deposited in bank in the name of the attorney individually;<sup>17</sup> the fact that none but money belonging to clients was deposited in the account in which the fund was placed does not alter the case.<sup>18</sup> The controlling consideration is whether it was deposited to the credit of the attorney without anything to

<sup>13</sup> *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28; *Pidgeon v. Williams*, 21 Grat. (Va.) 251.

<sup>14</sup> *Pidgeon v. Williams*, 21 Grat. (Va.) 251, wherein it was said that "even when the client is not informed of the fact, circumstances may excuse the attorney for the failure to give notice; as, for example, if his client has left the country, or his whereabouts is not known to the attorney, or he has not the means of communicating with him by reason of a state of war, the relations of one being with one of the belligerents, and of the other with the other belligerent, so that intercourse and intercommunication between them is interrupted."

<sup>15</sup> *Rogers v. Hopkins*, 70 Ga. 454; *Pidgeon v. Williams*, 21 Grat. (Va.) 251. See also *Kimmell v. Bittner*, 62 Pa. St. 203; *Gaar, Scott & Co. v. Hughes*, (Tenn.) 35 S. W. 1092.

<sup>16</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61; *Dean v. State*, 147 Ind. 215, 46 N. E. 528. See also *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28; *Ansley & Co. v. Anderson, Adair & Co.*, 35 Ga. 8;

*Norris v. Hero*, 22 La. Ann. 605; *McAllister v. Com.*, 30 Pa. St. 536; *Pidgeon v. Williams*, 21 Grat. (Va.) 251; *Sargeant v. Downey*, 49 Wis. 524, 5 N. W. 903.

<sup>17</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

In *Pidgeon v. Williams*, 21 Grat. (Va.) 251, it appeared that an attorney, having collected a claim, deducted his fees and deposited the balance in a bank, which was then solvent and in good standing, to the credit, not of his private account, but of an account called the collection account, to the credit of which he was in the habit of depositing all moneys collected for clients. The name of the client, for whose benefit the deposit was made, was entered in the bank book opposite the entry of the deposit. The client neglected to call for his money for some years, and until after the bank had become insolvent. It was held that the attorney was not liable for the money so deposited and lost.

<sup>18</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

designate or preserve its character as the property of the client.<sup>19</sup> In such a case, the good faith or intention of the attorney is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against his client, that the fact is not as he voluntarily made it to appear.<sup>20</sup> But the deposit of his client's money to the individual account of the attorney does not, in itself, amount to a conversion.<sup>1</sup>

**§ 328. Failure to Pay Over Proceeds.** — It is the plain duty of an attorney to notify his client with reasonable diligence of the collection of money in his behalf,<sup>2</sup> and promptly to pay it over,<sup>3</sup> where in view of all the facts he can do so with

<sup>19</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

<sup>20</sup> *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61.

<sup>1</sup> *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>2</sup> *Jett v. Hempstead*, 25 Ark. 462; *Spencer v. Smith*, 45 Ind. App. 17, 87 N. E. 154; *Voss v. Bachop*, 5 Kan. 59; *Riegi v. Phelps*, 4 N. D. 272, 60 N. W. 402; *Gaar, Scott & Co. v. Hughes*, (Tenn.) 35 S. W. 1092.

<sup>3</sup> *United States*.—In *re Martin & Co.*, 167 Fed. 236.

*Alabama*.—*Cameron v. Clarke*, 11 Ala. 259.

*Arkansas*.—*Burke v. Stillwell*, 23 Ark. 294.

*California*.—*McRaven v. Dameron*, 82 Cal. 57, 23 Pac. 33.

*Georgia*.—*Nisbet v. Lawson*, 1 Ga. 275.

*Illinois*.—*Jacobson v. Jones*, 128 Ill. App. 55.

*Indiana*.—*Dawson v. Compton*, 7 Blackf. 421; *Bougher v. Scobey*, 16

Ind. 151; *Spencer v. Smith*, 45 Ind. App. 17, 87 N. E. 154.

*Kentucky*.—*Wellenbrock v. Speckert*, 55 S. W. 200, 21 Ky. L. Rep. 1369.

*Maine*.—*Newcastle v. Bellard*, 3 Greenl. 369.

*Michigan*.—*Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222; *Reynolds v. Cavanagh*, 139 Mich. 387, 102 N. W. 986.

*Mississippi*.—*Grayson v. Wilkinson*, 5 Smedes & M. 268.

*Missouri*.—*Houx v. Russell*, 10 Mo. 246; *Sullivan v. Grace*, 5 Mo. App. 594; *Jenkins v. Clopton*, 141 Mo. App. 74, 121 S. W. 759.

*Nebraska*.—See *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880.

*New York*.—*Sackett v. Breen*, 50 Hun 602 mem., 3 N. Y. S. 473; *Caccia v. Isecke*, 123 App. Div. 779, 108 N. Y. S. 542; *Weber v. Manheimer*, 23 Misc. 157, 50 N. Y. S. 668; *Matter of Keen*, 39 Misc. 374, 79 N. Y. S. 857; *Marvin v. Ellwood*, 11 Paige 365.



safety.<sup>4</sup> It is immaterial that the money was paid by a prospective bankrupt<sup>5</sup> or that a third party informally claims the fund.<sup>6</sup> Nor can an attorney refuse to pay over the proceeds to his client on the ground that there is no evidence to show that the client is the owner thereof,<sup>7</sup> or that the money was tendered to, and refused by, the client at some former time.<sup>8</sup> A similar liability rests upon an attorney to notify and turn over any property other than money which has been received for the client.<sup>9</sup> As a rule, payment must of course be made to the client,<sup>10</sup> or his agent,<sup>11</sup> or in the manner

*Utah*.—*Everett v. Jones*, 32 Utah 489, 91 Pac. 360.

*Vermont*.—*Goodyear Metallic Rubber Shoe Co. v. Baker's Estate*, 81 Vt. 39, 15 Ann. Cas. 1207, 69 Atl. 160, 17 L.R.A.(N.S.) 667.

*Virginia*.—*Gathright v. Marshall*, 1 Hen. & M. 427.

*Wisconsin*.—*Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774; *Ott v. Hood*, 152 Wis. 97, 139 N. W. 762.

<sup>4</sup> *Marvin v. Ellwood*, 11 Paige (N. Y.) 365.

<sup>5</sup> *In re Martin & Co.*, 167 Fed. 236.

<sup>6</sup> *Jacobson v. Jones*, 128 Ill. App. 55; *Dunn v. Vannerson*, 7 How. (Miss.) 580. See also *Boulden v. Hebel*, 17 Serg. & R. (Pa.) 312.

*Compare Sims v. Brown*, 6 Thomp. & C. (N. Y.) 5, holding that there is no difference between the nature and the extent of the liability of an attorney and that of any other agent in respect to moneys collected by him for his principal and claimed by a third person; and that accordingly, where an attorney, after notice from the plaintiff that she claimed moneys collected by him in an action brought in behalf of one A., paid it over to his client, the plaintiff was entitled to recover of the attorney the amount so paid over. See also *Peyser v. Wilcox*, 64 How. Pr. (N. Y.) 525; *Mahler*

*v. Hyman*, 17 N. Y. S. 588. See *supra*, this section note 4.

<sup>7</sup> *Mahler v. Hyman*, 17 N. Y. S. 588.

<sup>8</sup> *Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

<sup>9</sup> *Cameron v. Clarke*, 11 Ala. 259; *Commonwealth Bank v. Patton*, 4 J. J. Marsh. (Ky.) 190; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

<sup>10</sup> An attorney, who has received the amount of a note left with him for collection by a client, and applied it conformably to his instructions, although the note was not negotiable, and was payable on its face to a third person, and no assignment to the client indorsed, is not liable to the party who was apparently entitled to the note, but of whose actual claim to the money due on it the attorney had no notice, if it appear, that the party himself had placed the note in the hands of the client, with authority to collect it; and it makes no difference, that the attorney was surety for the debts, to which, by the direction of his client, he had applied the amount collected. *Penny v. Caldwell*, 1 Bailey L. (S. C.) 345.

<sup>11</sup> *Wallace v. Peck*, 12 Ala. 768; *Fargo Gaslight, etc., Co. v. Greer*, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589.

specified by them,<sup>13</sup> but in some instances payment to other persons has been recognized.<sup>13</sup> Where the claim has been collected by one to whom it was remitted by the attorney for collection, he may pay it to the attorney;<sup>14</sup> but it would seem that, in the absence of a beneficial interest in the claim, the attorney cannot sue for the fund in his own name.<sup>15</sup> It has been held that the owner of the claim may recover from one to whom the claim was remitted by his attorney for collection.<sup>16</sup> But should the collector assume the responsibility of making payment to the owner, both he, and the attorney who remitted the claim to him, will be liable should payment be made to the wrong person.<sup>17</sup> The relation in which an attorney stands to his client will not permit him to file an ordinary bill of interpleader upon every claim made to the fund which has been collected by him for his client;<sup>18</sup> but where the fund has been formally claimed by a third party the attorney is warranted in demanding indemnity from his client before he turns it over to him, and, should the client fail so to indemnify him, the attorney

<sup>13</sup> *Long v. Sampson*, 4 Ky. L. Rep. 532; *Atkinson v. Howlett*, 11 Ky. L. Rep. 364; *Strohecker v. Hoffman*, 19 Pa. St. 223; *Kimmell v. Bittner*, 62 Pa. St. 203; *Paxton v. Steele*, 86 Va. 311, 10 S. E. 1.

*Compare Nisbet v. Lawson*, 1 Ga. 275, wherein it was held that if the attorney collects money under the direction and in the name of an agent, knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent, it is not a discharge of the attorney from his liability to his principal.

<sup>14</sup> When a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not indorsed, a payment by the attorney of the proceeds of the note to the payee

will discharge him from all liability to the person who placed the note in his hands. *Peck v. Wallace*, 19 Ala. 219.

<sup>14</sup> *Tyler v. Cockrell*, 107 S. W. 799, 32 Ky. L. Rep. 1126.

<sup>15</sup> *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Herron v. Bullitt*, 3 Sneed (Tenn.) 497. See also *Poor v. Guilford*, 10 N. Y. 273, 61 Am. Dec. 749.

<sup>16</sup> *Ex p. Edwards*, 7 Q. B. D. (Eng.) 155; *Robbins v. Heath*, 11 Q. B. 257 note b, 63 E. C. L. 257 note b; *Hanley v. Cassan*, 11 Jur. (Eng.) 1088; *Ironton Rolling Mills Co. v. Ross*, 6 Bush (Ky.) 103; *Thacker v. Dun*, 1 Mo. App. 41; *Riegi v. Phelps*, 4 N. D. 272, 60 N. W. 402. *Compare Robbins v. Fennell*, 11 Q. B. 248, 63 E. C. L. 248. See also *Cobb v. Becke*, 6 Q. B. 930, 51 E. C. L. 930.

<sup>17</sup> *Lewis v. Peck*, 10 Ala. 142.

<sup>18</sup> *Marvin v. Ellwood*, 11 Paige (N. Y.) 365.

may seek an interpleader, or other proceeding in the nature thereof, for the purpose of determining the ownership.<sup>19</sup> The attorney may, of course, deduct his lawful fees from the amount collected;<sup>20</sup> but the fact that the amount of his fees is in dispute does not warrant the attorney in retaining the whole sum collected until such dispute has been settled,<sup>1</sup> although it seems that he may, in such case, retain the amount claimed as fees.<sup>2</sup> The garnishment of funds in an attorney's hands has been considered elsewhere.<sup>3</sup>

**§ 329. Failing to Follow Instructions.** — It is the duty of an attorney to follow the instructions of his client with reference to the collection of claims; and, consequently, he is liable to the client for any loss resulting from his failure to do so.<sup>4</sup> Thus an attorney, when so instructed by his client, must bring suit,<sup>5</sup> put the claim in judgment,<sup>6</sup> and have it duly registered.<sup>7</sup> So, an attorney should comply with his client's instructions as to the mode of remitting the amount collected.<sup>8</sup> In cases of doubt it is the duty of an attorney to advise his client to the best of his judgment, and it is generally the wiser course for the client to act upon the advice so given; but if he is unwilling to do so, the attorney

<sup>19</sup> *Marvin v. Ellwood*, 11 Paige (N. Y.) 365; *Peyser v. Wilcox*, 64 How. Pr. (N. Y.) 525; *Mahler v. Hyman*, 17 N. Y. S. 588.

<sup>20</sup> *Com. v. McKay*, (Ky.) 20 S. W. 276; *Tyler v. Cockrell*, 107 S. W. 799, 32 Ky. L. Rep. 1126; *In re Klein*, 101 N. Y. S. 663.

<sup>1</sup> *Conyers v. Gray*, 67 Ga. 329; *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222. See also *Hamel v. People*, 97 Ill. App. 527.

<sup>2</sup> See *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

<sup>3</sup> See *supra*, § 301.

<sup>4</sup> *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Armstrong v. Craig*, 18 Barb. (N. Y.) 387; *Read v. Patterson*, 11 Lea (Tenn.) 431; *Fox v. Jones*, 4 Willson Civ. Cas. Ct. App.

Attys. at L. Vol. I.—37.

(Tex.) § 29, 14 S. W. 1007. See also *Whitney v. Abott*, 191 Mass. 59, 77 N. E. 524.

<sup>5</sup> *Cox v. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

But see *Hogg v. Martin*, Riley L. (S. C.) 156, wherein it was held that an attorney cannot be guilty of negligence in forbearing to bring a suit, where the parties had agreed to leave one of the matters in dispute to arbitration, the decision of which would render an action unnecessary.

<sup>6</sup> *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

<sup>7</sup> *Hett v. Pun Pong*, 18 Can. Sup. Ct. 290.

<sup>8</sup> *Grayson v. Wilkinson*, 5 Smedes & M. (Miss.) 268; *Kimmell v. Bittner*, 62 Pa. St. 203.

should follow the instructions of his client so far as the rules of law may permit.<sup>9</sup> The manner of conducting litigation, however, is not subject to the client's instructions.<sup>10</sup>

**§ 330. Effect of Authorizing Attorney to Exercise Discretion.** — Where an attorney is authorized to use his discretion as to what is best to be done in the interest of a client whose claim he has undertaken to collect, he cannot be held liable for a failure to succeed unless it appears that such failure was occasioned by a want of knowledge of the elementary principles of law such as every practicing attorney is presumed to understand, or, having such knowledge, the failure to exercise it.<sup>11</sup> This rule becomes important in view of the fact that in the absence of instructions from his client,<sup>12</sup> an attorney must be deemed to be authorized to exercise his discretion, as, for instance, where he is instructed to do the best he can with a claim.<sup>13</sup> Under such circumstances an attorney can only be expected to act prudently.<sup>14</sup> So, an attorney is not liable for failing to institute legal proceedings where, having exercised reasonable care, diligence, and skill in behalf of his client, he has good reason to doubt the propriety and expediency of such proceedings.<sup>15</sup>

<sup>9</sup> *Nave v. Baird*, 12 Ind. 319.

<sup>10</sup> See *supra*, §§ 246-252.

<sup>11</sup> *Morgan v. Giddings*, (Tex.) 1 S. W. 369. See also *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Bennett v. Phillips*, 57 Iowa 174, 10 N. W. 328; *Morrill v. Graham*, 27 Tex. 646; *Morgan v. Giddings*, (Tex.) 1 S. W. 369; *Hopkins v. Willard*, 14 Vt. 475.

<sup>12</sup> See *supra*, §§ 289, 329.

<sup>13</sup> *Wright v. Ligon*, Harp. Eq. (S. C.) 166.

<sup>14</sup> *Hopkins v. Willard*, 14 Vt. 474.

<sup>15</sup> *Morgan v. Giddings*, (Tex.) 1 S. W. 369; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

## CHAPTER XVI.

### ENFORCEMENT OF LIABILITY.

#### *Actions for Unauthorized and Fraudulent Acts.*

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- 332. For Fraud.

#### *Actions for Negligence Generally.*

- 333. Form of Action.
- 334. Pleading.
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#### *Actions for Negligence in Collection of Claims.*

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*Actions for Unauthorized and Fraudulent Acts.*

§ 331. For Unauthorized Acts. — The liability of an attorney for damage caused by his acts outside the scope of his authority may undoubtedly be enforced by an appropriate action.<sup>1</sup> But the mere fact that an attorney acts unauthorizedly does not render him liable; to have such effect the client must suffer loss or injury in consequence of the unauthorized act. Certainly the client would have no cause of action where he was benefited by the attorney's conduct.<sup>2</sup> In this connection it is advisable to consult other portions of this work discussing generally an attorney's authority and liability. Thus consideration has been given heretofore to the general scope of an attorney's authority,<sup>3</sup> his authority with respect to the compromise and release of his client's claims and demands,<sup>4</sup> and his power to appear for litigants,<sup>5</sup> and to conduct their litigation.<sup>6</sup> So, also, in other places throughout this work there will be found a discussion of the dealings between attorney and client generally,<sup>7</sup> the attorney's rights and duties with respect to the acquisition of interests adverse to those of his client,<sup>8</sup> and the representation of conflicting interests.<sup>9</sup> Attention has also been called to the liability of an attorney for breach of his duties towards his client,<sup>10</sup> for his unauthorized

<sup>1</sup> *Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488. See also the cases cited at the various cross-references given throughout this section.

<sup>2</sup> *Phillips v. Rhodes*, 2 Colo. App. 70, 29 Pac. 1011.

<sup>3</sup> See *supra*, §§ 199-214.

<sup>4</sup> See *supra*, §§ 215-228.

<sup>5</sup> See *supra*, §§ 229-245.

<sup>6</sup> See *supra*, §§ 246-283.

<sup>7</sup> See *supra*, §§ 152-163.

<sup>8</sup> See *supra*, §§ 164-173.

<sup>9</sup> See *supra*, §§ 174-182.

<sup>10</sup> See *supra*, §§ 284-287.

acts,<sup>11</sup> and for the acts of his partners, substitutes, clerks, and assistants.<sup>12</sup> Consideration has also been given to the attorney's liability to third persons,<sup>13</sup> and for costs and expenses.<sup>14</sup>

§ 332. For Fraud. — Akin to the liability spoken of in the preceding section is that occasioned by the attorney's fraud. Loss or injury so sustained by the client are not only recoverable in an action at law,<sup>15</sup> but a bill in equity will lie to remedy the wrong.<sup>16</sup> Thus a court of equity will entertain a bill brought to investigate fraudulent conduct in transactions between an attorney and client, and to declare such transactions void if found to be unfair.<sup>17</sup> So, equity has jurisdiction of a bill by a client against his attorney charging that the latter, in settling a claim against the client, fraudulently procured and retained a greater sum from the client than was paid to settle the claim.<sup>18</sup> The fraud must, of course, be duly alleged and proved.<sup>19</sup> But the well-established rule that the burden is upon the attorney to establish affirmatively that his transactions with his client were fair and just; that his client acted on full information of all the material circumstances, and that he did not take undue advantage of his client's complacency, confidence, ignorance or misconception, is applicable in cases of this character.<sup>20</sup> Nor does the statute of limitations begin to run

<sup>11</sup> See *supra*, §§ 288-291.

<sup>12</sup> See *supra*, §§ 292-294.

<sup>13</sup> See *supra*, §§ 295-302.

<sup>14</sup> See *supra*, §§ 305-311.

<sup>15</sup> *Roberts v. Gates*, 146 Mich. 169, 109 N. W. 264; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631; *Allen v. Frawley*, 106 Wis. 638, 82 N. W. 593.

*Under the N. Y. Code Civ. Pro.*, § 70, making an attorney liable in treble damages to one injured by his deceit or collusion, such misconduct must impede or prejudice the rights or remedies of the injured party, and must be adjudicated in the proceeding. *Franzone v. Tumminelli*, 67 Misc. 549, 123 N. Y. S. 455. See also *Looff v. Lawton*, 14 Hun 588.

<sup>16</sup> *Brainard v. Singo*, 164 Ala. 353, 51 So. 522; *Maloney v. Terry*, 70 Ark. 189, 66 S. W. 919, 72 S. W. 570; *Kelly v. Allin*, 212 Mass. 327, 99 N. E. 273; *Broyles v. Arnold*, 11 Heisk. (Tenn.) 484.

<sup>17</sup> *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299, *affirming* 103 Ill. App. 239.

<sup>18</sup> *Maloney v. Terry*, 70 Ark. 189, 66 S. W. 919, 72 S. W. 570.

<sup>19</sup> *Brainard v. Singo*, 164 Ala. 353, 51 So. 522; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631.

<sup>20</sup> *Couse v. Horton*, 23 App. Div. 198, 49 N. Y. S. 132.

against the client until he knows, or should have known, of the fraud.<sup>1</sup> In other places consideration has been given to the rights and duties of an attorney in respect to the dealings between himself and his client,<sup>1</sup> and the attorney's liability for the breach of his duties toward his client.<sup>2</sup> Attention has also been given heretofore to the acquisition by the attorney of interests adverse to those of his client,<sup>3</sup> and to the representation of conflicting interests.<sup>4</sup>

*Actions for Negligence Generally.*

§ 333. Form of Action. — It is true that an action against an attorney for negligence originates in contract, and at common law the plaintiff might sue either in assumpsit or in trespass on the case, though the latter form of action was usually adopted.<sup>5</sup> Where common-law forms of practice still prevail either of these remedies may be employed; in code states the substitutes therefor may be used. A bill in equity does not lie for this purpose.<sup>6</sup>

<sup>1</sup> *Morgan v. Tenner*, 83 Pa. St. 305.

<sup>1</sup> See *supra*, §§ 152-163.

<sup>2</sup> See *supra*, §§ 284-287.

<sup>3</sup> See *supra*, §§ 164-173.

<sup>4</sup> See *supra*, §§ 174-182.

<sup>5</sup> *England*.—*Swannell v. Ellis*, 1 Bing. 347, 8 E. C. L. 542; *Legge v. Tucker*, 1 H. & N. 500; *Russel v. Palmer*, 2 Wils. C. Pl. 325.

*Alabama*.—*Cook v. Bloodgood*, 7 Ala. 683; *Walker v. Goodman*, 21 Ala. 647. See also *Pinkston v. Arington*, 98 Ala. 489, 13 So. 561.

*Arkansas*.—*Sevier v. Holliday*, 2 Ark. 512.

*Georgia*.—*O'Barr v. Alexander*, 37 Ga. 195.

*Illinois*.—*Goldzier v. Poole*, 82 Ill. App. 469; *Hill v. Montgomery*, 84 Ill. App. 300, *affirmed* 184 Ill. 220, 56 N. E. 320. See also *Morrison v. Burnett*, 56 Ill. App. 129.

*Maine*.—*Stimpson v. Sprague*, 6 Greenl. 470.

*Massachusetts*.—*Salisbury v. Gourgas*, 10 Metc. 442; *Wilson v. Coffin*, 2 Cush. 316; *Dearborn v. Dearborn*, 15 Mass. 316.

*Oregon*.—*Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631.

*Rhode Island*.—*Holmes v. Peck*, 1 R. I. 242.

*Vermont*.—*Crooker v. Hutchinson*, 1 Vt. 73.

*Book account* does not lie. *Smalley v. Soragen*, 30 Vt. 2.

<sup>6</sup> *British Mut. Invest. Co. v. Cobbold*, L. R. 19 Eq. (Eng.) 627, 44 L. J. Ch. 332, 23 W. R. 487; *Williams v. Reed*, 3 Mason 405, 29 Fed. Cas. No. 17,733; *Crothers v. Lee*, 29 Ala. 337; *Nancrede v. Voorhis*, 32 N. J. Eq. 524.



§ 334. **Pleading.**—The pleadings in actions for negligence against attorneys are, of course, governed by the principles which apply in other actions of that character. Thus it is absolutely essential that the declaration, complaint, petition or other initiatory pleading on the part of the plaintiff should set out a sufficient statement of facts to show a cause of action;<sup>7</sup> it is not sufficient to plead conclusions of law or the conclusions of the pleader, unsupported by allegations of issuable facts.<sup>8</sup> The facts which constitute negligence have been fully considered heretofore.<sup>9</sup> In order to show that the relation of attorney and client existed between the parties, the retainer of the attorney in his professional capacity, by or for the plaintiff, must appear;<sup>10</sup> but it is not necessary to aver that a retaining fee was paid.<sup>11</sup> In the subjoined notes will be found cases wherein the declaration, or other such pleading, was held to be sufficient in charging the defendant attorney with unskillful management of litigation,<sup>12</sup> neglecting to

<sup>7</sup> *Indiana*.—*Batty v. Fout*, 54 Ind. 482.

*Kentucky*.—*Anderson v. Conklin*, 11 Ky. L. Rep. 183.

*Massachusetts*.—*Wilson v. Coffin*, 2 Cush. 316.

*Missouri*.—*National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561.

*New York*.—*Malone v. Sherman*, 49 Super. Ct. 530; *Elder v. Bogardus*, Hill & D. Supp. 116.

*Pennsylvania*.—*Keir v. Quin*, 12 W. N. C. 370.

*South Dakota*.—*Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716.

*Tennessee*.—*Bruce v. Baxter*, 7 Lea 477.

<sup>8</sup> *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561.

<sup>9</sup> See *supra*, §§ 312–330.

<sup>10</sup> *Elder v. Bogardus*, Hill & D. Supp. (N. Y.) 116; *Stephens v. White*, 2 Wash. (Va.) 203.

See *supra*, §§ 153, 172.

<sup>11</sup> *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *French v. Armstrong*, 80 N. J. L. 152, 76 Atl. 336.

An allegation that the plaintiff then and there employed the defendant, sufficiently shows a consideration for the attorney's engagement. *Stephens v. White*, 2 Wash. (Va.) 203.

But see *Cavillaud v. Yale*, 3 Cal. 108, 58 Am. Dec. 388, wherein it was said that while a declaration against an attorney need only aver generally that he was retained, still if it allege that he was retained in consideration of certain reasonable fees and rewards to be paid him, without stating that such payment was to be at a future time, it must also aver payment.

<sup>12</sup> *Walker v. Goodman*, 21 Ala. 647; *Skillen v. Wallace*, 36 Ind. 319; *Jones v. White*, 90 Ind. 255; *Wilson v. Coffin*, 2 Cush. (Mass.) 316.

file a declaration,<sup>13</sup> the negligent commencement<sup>14</sup> and the improper dismissal of a suit,<sup>15</sup> negligently dismissing the levy of a writ of attachment,<sup>16</sup> negligent preparation of papers,<sup>17</sup> failing to take proceedings for review,<sup>18</sup> giving improper advice,<sup>19</sup> giving negligent advice as to the making of a loan,<sup>20</sup> negligent examination of title,<sup>1</sup> neglecting to learn of the existence of incumbrances,<sup>2</sup> failure to foreclose a mortgage within a reasonable time,<sup>3</sup> and failure to disclose the existence of material facts.<sup>4</sup>

§ 335. Proof. — In suits for the recovery of damages because of the negligence of an attorney, the burden rests with the plaintiff to prove every essential element of his cause of action<sup>5</sup> as

<sup>13</sup> *Stephens v. White*, 2 Wash. (Va.) 203.

<sup>14</sup> *Evans v. Watrous*, 2 Port. (Ala.) 205.

<sup>15</sup> *Evans v. Watrous*, 2 Port. (Ala.) 205.

<sup>16</sup> *Walker v. Goodman*, 21 Ala. 647.

<sup>17</sup> *Jones v. White*, 90 Ind. 255.

<sup>18</sup> *Rosebud Min. & Mill Co. v. Hughes*, 16 Colo. App. 162, 64 Pac. 247.

<sup>19</sup> *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

<sup>20</sup> *Gardner v. Wood*, 37 Misc. 93, 74 N. Y. S. 750.

<sup>1</sup> *Thomas v. Schee*, 80 Iowa 237, 45 N. W. 539.

<sup>2</sup> *Humboldt Bldg. Assoc. v. Ducker*, 111 Ky. 759, 64 S. W. 671, 23 Ky. L. Rep. 1073.

<sup>3</sup> *French v. Armstrong*, 80 N. J. L. 152, 76 Atl. 336.

<sup>4</sup> *French v. Armstrong*, 80 N. J. L. 152, 76 Atl. 336; *Gardner v. Wood*, 37 Misc. 93, 74 N. Y. S. 750.

<sup>5</sup> *England*.—See *Harrington v. Binns*, 3 F. & F. 942.

*Canada*.—See *O'Donohoe v. Whitty*, 2 Ont. 424, affirmed 20 Can. L. J. 146.

*United States*.—*Suydam v. Vance*,

2 McLean 99, 23 Fed. Cas. No. 13,657; *Spangler v. Sellers*, 5 Fed. 882; *Eberhardt v. Harkless*, 115 Fed. 816.

*Alabama*.—*Hair v. Glover*, 14 Ala. 500.

*Arkansas*.—*Palmer v. Ashley*, 3 Ark. 75; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Jett v. Hempstead*, 25 Ark. 462.

*Georgia*.—*Jenkins v. Stephens*, 60 Ga. 216.

*Kentucky*.—*Eccles v. Stephenson*, 3 Bibb 517, followed *Wickliffe v. Davis*, 2 J. J. Marsh. 69.

*Louisiana*.—*Spiller v. Davidson*, 4 La. Ann. 171.

*Massachusetts*.—*Thompson v. Dickinson*, 159 Mass. 210, 34 N. E. 262; *Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924.

*Minnesota*.—*Joy v. Morgan*, 35 Minn. 184, 28 N. W. 237.

*Mississippi*.—*Hoover v. Shackelford*, 23 Miss. 520.

*Nebraska*.—*Prusa v. Everett*, 86 Neb. 456, 125 N. W. 1076.

*New York*.—*Seymour v. Cagger*, 13 Hun 29; *Lamprecht v. Bien*, 125 App. Div. 811, 110 N. Y. S. 128; *Cleveland v. Cromwell*, 128 App. Div. 237, 112 N. Y. S. 643.

alleged.<sup>6</sup> Thus, to charge an attorney with negligence in not setting up in defense facts communicated to him by his client, there must be evidence not only of the existence of the facts, but also that they were susceptible of proof at the trial by the exercise of proper diligence on the part of the attorney.<sup>7</sup> The rule that an attorney is bound to show fairness in his dealings with the client has no application here.<sup>8</sup> Negligence on the part of the attorney is not to be presumed;<sup>9</sup> but, in cases of this character, he is entitled to the benefit of the rule that every one shall be presumed to have discharged his legal and moral obligations until the contrary shall be made to appear.<sup>10</sup> It is incumbent on the plaintiff to prove that the relation of attorney and client existed between himself and the defendant with respect to the subject-matter of the litigation.<sup>11</sup> The ordinary rules as to the admission of evidence

*Tennessee.*—Bruce v. Baxter, 7 Lea 477.

*Virginia.*—Staples v. Staples, 85 Va. 76, 7 S. E. 199.

<sup>6</sup> Hessin v. Heck, 88 Ind. 449; Rensker v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641; Hall v. Strode, 19 Neb. 658, 28 N. W. 312.

<sup>7</sup> Hastings v. Halleck, 13 Cal. 203.

<sup>8</sup> Schreiber v. Heath, 103 App. Div. 364, 92 N. Y. S. 1043.

<sup>9</sup> *Alabama.*—Pearson v. Darrington, 32 Ala. 227.

*Arkansas.*—Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

*Illinois.*—Priest v. Dodsworth, 235 Ill. 613, 14 Ann. Cas. 340, 85 N. E. 940.

*Indiana.*—Doe v. Brown, 8 Blackf. 443.

*Iowa.*—Cullison v. Lindsay, 108 Iowa 124, 78 N. W. 847.

*Maine.*—Mattocks v. Young, 66 Me. 459.

*Nebraska.*—White v. Merriam, 16 Neb. 96, 19 N. W. 703; Reumping v. Wharton, 56 Neb. 536, 76 N. W. 1076.

*New York.*—Schreiber v. Heath, 103 App. Div. 364, 92 N. Y. S. 1043.

*Rhode Island.*—Holmes v. Peck, 1 R. I. 242.

*South Carolina.*—Rice v. Bamberg, 59 S. C. 498, 38 S. E. 209.

*Texas.*—Merritt v. Clow, 2 Tex. 582.

*Virginia.*—Staples v. Staples, 85 Va. 76, 7 S. E. 199.

*Wisconsin.*—Thomas v. Steele, 22 Wis. 207; Andrews v. Thayer, 30 Wis. 228; Beem v. Kimberly, 72 Wis. 343, 39 N. W. 542.

<sup>10</sup> Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Priest v. Dodsworth, 235 Ill. 613, 14 Ann. Cas. 340, 85 N. E. 940; Holmes v. Peck, 1 R. I. 242; Staples v. Staples, 85 Va. 76, 7 S. E. 199.

<sup>11</sup> *England.*—Fish v. Kelly, 17 C. B. N. S. 194, 112 E. C. L. 194; Sawyer v. Goodwin, 1 Ch. D. 351, 45 L. J. Ch. 289; Dartnall v. Howard, 4 B. & C. 345, 10 E. C. L. 351, 6 Dowl. & R. 438. See also Aldis v. Gardner, 1 C. & K. 564, 47 E. C. L. 564; Langdon v. Godfrey, 4 F. & F. 445.

*Scotland.*—Robertson v. Fleming, 4 Macq. H. L. 167.

*United States.*—National Sav.

are applicable.<sup>13</sup> In an action against an attorney for giving improper advice, it is competent to prove by the testimony of other lawyers whether, in their opinion, the advice given by the defendant was such as a prudent, careful lawyer, of ordinary capacity and intelligence, would or ought to have given, under the circumstances.<sup>14</sup> A conflict of evidence on the question of the attorney's negligence presents a question of fact for the jury,<sup>14</sup> but where the facts are ascertained the question is one of law for the court.<sup>15</sup>

§ 336. **Defenses Generally.**—Where the plaintiff shows a prima facie cause of action, the law casts upon the attorney the burden of proving an adequate excuse,<sup>16</sup> and he may establish, in his defense, any facts which tend to overthrow the plaintiff's case.<sup>17</sup> Thus where an attorney is charged with failure to attend

*Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 U. S. (L. ed.) 592.

*Alabama*.—See *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*California*.—*Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 52 Am. St. Rep. 88, 31 L.R.A. 862.

*Kansas*.—See *Cory v. Wirth*, 21 Kan. 10.

*Maine*.—See *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39.

*Minnesota*.—See *Ryan v. Long*, 35 Minn. 394, 29 N. W. 51.

*Mississippi*.—*Grayson v. Wilkin-*  
*son*, 5 Smedes & M. 268.

*New Jersey*.—*Kahl v. Love*, 37 N. J. L. 5.

*New York*.—*Cleveland v. Crom-*  
*well*, 128 App. Div. 237, 112 N. Y. S. 643.

<sup>13</sup> *National Sav. Bank v. Ward*, 100 U. S. 195, 25 U. S. (L. ed.) 621; *Hinckley v. Krug*, (Cal.) 34 Pac. 118; *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

<sup>13</sup> *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

<sup>14</sup> *Alabama*.—*Evans v. Watrous*, 2 Port. 205; *Pinkston v. Arrington*, 98 Ala. 489, 13 So. 561.

*Arkansas*.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

*Maryland*.—*Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

*New York*.—*Abcel v. Swann*, 21 Misc. 677, 47 N. Y. S. 1088; *O'Hara v. Brophy*, 24 How. Pr. 379; *Stein v. Kremer*, 112 N. Y. S. 1087.

*Pennsylvania*.—*Hamsher v. Kline*, 57 Pa. St. 397.

*South Carolina*.—*Hogg v. Martin*, *Riley* L. 156.

*Texas*.—*Jinks v. Moppin*, 80 S. W. 390; *Patterson v. Frazer*, 100 Tex. 103, 94 S. W. 324, reversing 93 S. W. 146.

<sup>15</sup> *Gambert v. Hart*, 44 Cal. 542.

<sup>16</sup> *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

<sup>17</sup> *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007.

to the defense of a case which he was retained to conduct, he may show, as a cause for his failure, that the client, although so requested, neglected to instruct him as to what defense could be made.<sup>18</sup> So the defendant may prove that the client is himself a lawyer, and that he had made an independent examination of the law relating to the cause;<sup>19</sup> or that other counsel were relied upon to transact the business in connection with which the charge of negligence has been made;<sup>20</sup> or that the negligence with which he is charged was the result of a mistaken view of a doubtful legal question.<sup>1</sup> So, in an action against an attorney for negligence in losing the evidence of a debt, it is competent to show that the plaintiff successfully pursued another remedy.<sup>2</sup> Where the alleged negligence consists of a failure to file a declaration, or other such pleading, the attorney may prove that he was not retained in the cause in season to have filed it.<sup>3</sup> And where an attorney was liable for failure to file a building contract, it was held to be competent to show in defense that the owner, who had been required to pay a subcontractor's claim, had discharged the builder who was primarily liable.<sup>4</sup> So the defendant may show matter in mitigation of damages,<sup>5</sup> and may assert a counterclaim.<sup>6</sup> But in an action against him for negligence in the management of a cause, an attorney cannot be allowed to show that he consulted a distinguished attorney respecting the proper course to be pursued, and the advice given by such attorney.<sup>7</sup> It is no defense, in an action by a client against his attorney for failing to report a judgment lien on property on which the client placed a loan, that the client might have compelled the judgment creditor to resort to other property to satisfy his judgment.<sup>8</sup> Nor can an attorney, employed to ex-

<sup>18</sup> *Hastings v. Halleck*, 13 Cal. 203; *Salisbury v. Gourgas*, 10 Metc. (Mass.) 442; *Benton v. Craig*, 2 Mo. 198.

<sup>19</sup> *Carr v. Glover*, 70 Mo. App. 242.

<sup>20</sup> *Cornelissen v. Ort*, 132 Mich. 294. 93 N. W. 617, 9 Detroit Leg. N. 604.

<sup>1</sup> *Humboldt Bldg. Assoc. v. Ducker*, 111 Ky. 759, 64 S. W. 671.

<sup>2</sup> *Huntington v. Rumnill*, 3 Day (Conn.) 390.

<sup>3</sup> *Stephens v. White*, 2 Wash. (Va.) 203.

<sup>4</sup> *Fenaille v. Coudert*, 44 N. J. L. 286.

<sup>5</sup> See *infra*, § 338.

<sup>6</sup> *Rosebud Min. etc., Co. v. Hughes*, 21 Colo. App. 247, 121 Pac. 674.

<sup>7</sup> *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

<sup>8</sup> *Watson v. Calvert Bldg. Assoc. etc.*, 91 Md. 25, 45 Atl. 879.

amine a land title, set up in defense of an action for damages for his negligence in overlooking a lien on such lands, that such lien was erroneous or of doubtful validity.<sup>9</sup> An attorney who undertakes to conduct a suit cannot allege, as a defense to an action for failure to file the declaration, that there was no consideration for his engagement.<sup>10</sup> Nor can an attorney, sued for negligence or want of skill, set up in defense of the action the fact that the contract between him and his client was champertous.<sup>11</sup> It seems that the attorney may plead in bar of the action, the fact that summary proceedings are pending against him in which the same questions are involved.<sup>12</sup>

§ 337. Statute of Limitations. — Actions against attorneys for negligence being, in most instances, based on the theory of a breach of contract on the part of the attorney, the statute of limitations, governing the time within which such actions may be brought, may be set up by the attorney by way of defense. Where the negligence charged cannot be said to be a breach of contract, the statute of limitations applicable to torts generally would apply.<sup>13</sup> In the absence of fraud, the statute begins to run from the time the cause of action accrued; that is, when the client first had knowledge, or the means of knowledge, of the attorney's negligent act.<sup>14</sup> Of course, where the attorney conceals from his client the

<sup>9</sup> *Gilman v. Hovey*, 26 Mo. 280.

<sup>10</sup> *Stephens v. White*, 2 Wash. (Va.) 203.

<sup>11</sup> *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

<sup>12</sup> See *infra*, § 356.

<sup>13</sup> *United States v. Wilcox v. Plummer*, 4 Pet. 172, 7 U. S. (L. ed.) 821.

*Alabama.*—*Mardis v. Shackelford*, 4 Ala. 493.

*California.*—*Hays v. Ewing*, 70 Cal. 127, 11 Pac. 602.

*Indiana.*—See *Foulks v. Falls*, 91 Ind. 315.

*Mississippi.*—*Cook v. Rives*, 13 Smedes & M. 329, 53 Am. Dec. 88.

*New York.*—*People v. Brotherson*, 36 Barb. 662.

*Pennsylvania.*—*Downey v. Garard*, 24 Pa. St. 52.

*South Carolina.*—*Thomas v. Ervin*, Cheves L. 22, 34 Am. Dec. 586.

*Tennessee.*—See *Smith v. Owen*, 7 Lea 53; *Bruce v. Baxter*, 7 Lea 479; *Hawkins v. Walker*, 4 Yerg. 188.

<sup>14</sup> *England.*—*Battley v. Faulkner*, 3 B. & Ald. 288, 5 E. C. L. 288; *Short v. McCarthy*, 3 B. & Ald. 626, 5 E. C. L. 403; *Granger v. George*, 5 B. & C. 149, 11 E. C. L. 185; *Howell v. Young*, 5 B. & C. 259, 11 E. C. L. 219; *Sheriff v. Bradshaw*, 1 Cro. Eliz. 53; *Smith v. Fox*, 6 Hare 386, 12 Jur. 130.

*Pennsylvania.*—*Glenn v. Cuttle*, 2 Grant Cas. 273; *Derrickson v. Cady*, 7 Pa. St. 27; *McDowell v. Potter*, 8

facts which constitute the cause of action, the running of the statute will only begin from the discovery thereof by the client.<sup>15</sup>

**§ 338. Damages.** — The plaintiff must allege and prove damages; and unless substantial injury is proved, the recovery will be confined to a nominal sum.<sup>16</sup> In no case can an attorney be held liable for more than the actual damage sustained by his client, except in cases of wilful or deliberate default.<sup>17</sup> Punitive damages may be recovered where the wrong charged and proved against the attorney shows malice, or fraud; or such gross negligence or recklessness as to indicate, on the part of the attorney, a wilful or

Pa. St. 189, 49 Am. Dec. 503; Rhines v. Evans, 66 Pa. St. 195, 5 Am. Rep. 365; Lawall v. Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

*Rhode Island.*—Forrow v. Arnold, 22 R. I. 305, 47 Atl. 693.

*Tennessee.*—Smith v. Owen, 7 Lea 53.

<sup>15</sup> Voss v. Bachop, 5 Kan. 67.

<sup>16</sup> *California.*—Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937; Hinckley v. Krug, 34 Pac. 118.

*Colorado.*—Phillips v. Rhodes, 2 Colo. App. 70, 29 Pac. 1011.

*Indiana.*—Nave v. Baird, 12 Ind. 318.

*Michigan.*—Cornelissen v. Ort, 132 Mich. 294, 93 N. W. 617, 9 Detroit Leg. N. 604.

*Minnesota.*—Joy v. Morgan, 35 Minn. 184, 28 N. W. 237.

*Missouri.*—National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561.

*New York.*—Arnold v. Robertson, 3 Daly 298; Lamprecht v. Bien, 125 App. Div. 811, 110 N. Y. S. 128; Quinn v. Van Pelt, 56 N. Y. 417.

*Ohio.*—Harter v. Morris, 18 Ohio St. 492.

*Rhode Island.*—Forrow v. Arnold, 22 R. I. 305, 47 Atl. 693.

*Tennessee.*—Collier v. Pulliam, 13 Lea 114.

<sup>17</sup> *United States.*—Suydam v. Vance, 2 McLean 99, 23 Fed. Cas. No. 13,657.

*Arkansas.*—Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

*Connecticut.*—Huntington v. Rumnill, 3 Day 390.

*Georgia.*—Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Lilly v. Boyd, 72 Ga. 83.

*Illinois.*—Goldzier v. Poole, 82 Ill. App. 469.

*Massachusetts.*—Whitney v. Abbott, 191 Mass. 59, 77 N. E. 524.

*Michigan.*—Dean v. Radford, 141 Mich. 36, 104 N. W. 329.

*Mississippi.*—Grayson v. Wilkin-son, 5 Smedes & M. 268.

*New York.*—Quinn v. Van Pelt, 56 N. Y. 417; Vooth v. McEachen, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431; Fay v. McGuire, 20 App. Div. 569, 47 N. Y. S. 286, affirmed without opinion 162 N. Y. 644, 57 N. E. 1109; Childs v. Comstock, 69 App. Div. 160, 74 N. Y. S. 643; Lamprecht v. Bien, 125 App. Div. 811, 110 N. Y. S. 128; Flynn v. Judge, 149 App. Div. 278, 133 N. Y. S. 794.

wanton disregard of his client's rights.<sup>18</sup> Thus it has been held that punitive damages may be recovered where an attorney falsely gives his client information that leads her to a second marriage which renders her liable to indictment and prosecution for bigamy.<sup>19</sup> So, an attorney may become liable for punitive damages which his client has been obliged to pay, or which he has failed to recover from another, because of his attorney's negligence.<sup>20</sup> The attorney may, of course, show any facts which have a tendency to mitigate the damages;<sup>1</sup> as, for instance, a settlement by the client of the action in connection with which the negligence is charged;<sup>2</sup> or that the client continued to employ the attorney after he had knowledge of the alleged negligence.<sup>3</sup> But in a suit against an attorney for negligence in not moving for a return of property

*Pennsylvania.*—*McDaniels v. Cutler*, 3 Brewst. 57; *Derrickson v. Cady*, 7 Pa. St. 27.

*Rhode Island.*—*Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693.

*South Carolina.*—*Johnson v. Monro*, 3 Hill L. 8.

*Vermont.*—*Crooker v. Hutchinson*, 2 D. Chip. 117.

<sup>18</sup> *Hill v. Montgomery*, 84 Ill. App. 300, affirmed 184 Ill. 220, 56 N. E. 320.

<sup>19</sup> *Hill v. Montgomery*, 84 Ill. App. 300, affirmed 184 Ill. 220, 56 N. E. 320.

<sup>20</sup> *Patterson v. Frazer*, (Tex.) 79 S. W. 1077.

But see *Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693, wherein it appears that "A., an attorney, issued for B., his client, a void writ upon which C. was arrested. After judgment in favor of C., an action of malicious prosecution was commenced against B. by C., in which he recovered the sum of \$400 as damages. This amount, which was largely punitive, was based upon one or more allegations of the gravamen, viz.: (1) that the of-

ficer (through ignorance and without instructions from A.) took C. to the county seat after bail had been procured; (2) that the affidavit was false in stating that B. had a just claim against C.; and (3) that it was false in stating that C. was about to leave the state. After satisfaction of the judgment, B. brought an action against A. for negligence and recovered the amount of said judgment as damages." And it was held "that none of the things alleged as gravamen against B. upon which punitive damages were recovered could be charged upon A. as the proximate result of his neglect;" and also "that A. was liable for issuing the void writ, for the cost of prosecuting the original suit; the judgment against B. in that suit; and, if C. should sue for an illegal arrest, the judgment against B. on that account."

<sup>1</sup> *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739.

<sup>2</sup> *Drury v. Butler*, 171 Mass. 171, 50 N. E. 527.

<sup>3</sup> *Derrickson v. Cady*, 7 Pa. St. 27.



in a replevin suit, on nonsuit, it is not competent for him to show, in reduction of damages, that the plaintiff in replevin was the real owner of the property, as that would amount to a retrial of the replevin suit.<sup>4</sup>

§ 339. **Survival of Action.** — Actions against attorneys for negligence survive the death of either party.<sup>5</sup> Such survival is now quite generally provided for by statute; but even in the absence of statute, cases of this character were held to form an exception to the general rule that actions for the redress of personal injuries only do not survive. This exception proceeds on the theory that, in those cases, the injury to the person is merely incidental, while the injury to property and property rights is substantial.<sup>6</sup> It has been stated, however, that these actions did not survive at common law,<sup>7</sup> excepting, possibly, where special damage was alleged.<sup>8</sup>

*Actions for Negligence in Collection of Claims.*

§ 340. **Pleading and Proof.** — As stated above with reference to actions for negligence generally,<sup>9</sup> so, where the negligence charged is in connection with the failure of the attorney to collect his client's claims, it is equally essential that every element of such a cause should be alleged and proved by the client.<sup>10</sup> Thus,

<sup>4</sup> *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39.

<sup>5</sup> *Maine*.—*Stimpson v. Sprague*, 6 Greenl. 470.

*New Hampshire*.—*Jenkins v. French*, 58 N. H. 532.

*New Jersey*.—*Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186.

*New York*.—*Elder v. Bogardus, Hill & D. Supp.* 116.

*Pennsylvania*.—*Miller v. Wilson*, 24 Pa. St. 114.

<sup>6</sup> *Warner Bank v. Clement*, 58 N. H. 533.

<sup>7</sup> *Elder v. Bogardus, Hill & D. Supp.* (N. Y.) 116. See *Chamberlain v. Williamson*, 2 M. & S. (Eng.) 408.

<sup>8</sup> *Henshaw v. Miller*, 17 How. 212, 15 U. S. (L. ed.) 222; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. See also *Knights v. Quarles*, 2 Brod. & B. 102, 6 E. C. L. 55, 4 Moo. C. Pl. 532; *Chamberlain v. Williamson*, 2 M. & S. (Eng.) 408.

<sup>9</sup> See *supra*, §§ 334, 335.

<sup>10</sup> *Alabama*.—*Paulding v. Lee*, 20 Ala. 753.

*Arkansas*.—*Sevier v. Holliday*, 2 Ark. 512; *Peay v. Ringo*, 22 Ark. 68.

*California*.—*Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

*Illinois*.—*Singer v. Steele*, 24 Ill. App. 58.

it must be alleged and proved that the claim was placed in the hands of the attorney for collection,<sup>11</sup> that such claim was a subsisting debt,<sup>12</sup> that it was collectable,<sup>13</sup> that it was the attorney's duty to collect it,<sup>14</sup> that there was a failure to collect,<sup>15</sup> and that this failure was due to the attorney's negligence.<sup>16</sup> There is no presumption of negligence in this class of cases any more than there is in the other.<sup>17</sup> The general rules of evidence prevail.<sup>18</sup>

*Kentucky*.—McArthur v. Baker, 7 Ky. L. Rep. 440.

*Mississippi*.—See Ransom v. Cothran, 6 Smedes & M. 167.

*Tennessee*.—Bruce v. Baxter, 7 Lea 477.

<sup>11</sup> Priest v. Dodsworth, 235 Ill. 613, 14 Ann. Cas. 340, 85 N. E. 940; Vooth v. McEachen, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431.

<sup>12</sup> *Arkansas*.—Sevier v. Holliday, 2 Ark. 512; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262.

*Illinois*.—Goldzier v. Poole, 82 Ill. App. 469.

*Kentucky*.—Baker v. McArthur, 5 Ky. L. Rep. 185.

*Louisiana*.—Spiller v. Davidson, 4 La. Ann. 171.

*Tennessee*.—Collier v. Pulliam, 13 Lea 114.

<sup>13</sup> Hoover v. Shackelford, 23 Miss. 520; Collier v. Pulliam, 13 Lea (Tenn.) 118; Staples v. Staples, 85 Va. 76, 84, 7 S. E. 199.

<sup>14</sup> *England*.—In re Chitty, 2 Dowl. 421.

*United States*.—Robertson v. Chapman, 152 U. S. 673, 14 S. Ct. 741, 38 U. S. (L. ed.) 592.

*Louisiana*.—Hughes v. Boyce, 2 La. Ann. 803.

*Maine*.—Odlin v. Stetson, 17 Me. 244, 35 Am. Dec. 248; Smallwood v. Norton, 20 Me. 83, 37 Am. Dec. 39.

*Mississippi*.—Grayson v. Wilkinson, 5 Smedes & M. 268.

*New York*.—In re Dakin, 4 Hill 42.

*Texas*.—Morgan v. Giddings, 1 S. W. 369.

<sup>15</sup> Palmer v. Ashley, 3 Ark. 75; Bougher v. Scobey, 23 Ind. 583; Spiller v. Davidson, 4 La. Ann. 171.

<sup>16</sup> *Alabama*.—Jackson v. Clopton, 66 Ala. 29.

*Arkansas*.—Palmer v. Ashley, 3 Ark. 75.

*Georgia*.—Nisbet v. Lawson, 1 Ga. 275.

*Illinois*.—Priest v. Dodsworth, 235 Ill. 613, 14 Ann. Cas. 340, 85 N. E. 940; Goldzier v. Poole, 82 Ill. App. 469.

*Indiana*.—Nickless v. Pearson, 81 Ind. 429. See also Hillegass v. Bender, 78 Ind. 227.

*Louisiana*.—Spiller v. Davidson, 4 La. Ann. 171.

*Mississippi*.—Ransom v. Cothran, 6 Smedes & M. 167.

*New York*.—Vooth v. McEachen, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488, reversing 91 App. Div. 30, 86 N. Y. S. 431.

*Tennessee*.—Read v. Patterson, 11 Lea 431.

*Virginia*.—Staples v. Staples, 85 Va. 76, 7 S. E. 199.

<sup>17</sup> Jenkins v. Stephens, 60 Ga. 216. And see *supra*, § 335.

<sup>18</sup> Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134.

The proof must conform to the pleadings.<sup>19</sup> The attorney's receipt for the claim is sufficient evidence not only of that fact,<sup>20</sup> but also of the fact that the relation of attorney and client existed between the parties.<sup>1</sup> Such receipt also raises a presumption that the claim was received for the purpose of collection,<sup>2</sup> and implies an agreement on the part of the attorney to use due diligence for that purpose.<sup>3</sup> But it is not evidence of negligence in failing to make the collection.<sup>4</sup> Whether attorneys employed to collect a note were negligent in surrendering it, and accepting in good faith in its place a new note which, as a matter of fact, did not bind the indorsers because of a material alteration made after they had signed it, is a question of fact, and not of law.<sup>5</sup>

**§ 341. Defenses Generally.** — The attorney may set up and prove any defense which he may have to the action. What will be available or effective for this purpose, however, must depend on the facts of the particular case. The burden of proving his defense rests, of course, upon the attorney.<sup>6</sup> Thus the attorney may prove, in his defense, that the claim which he was employed to collect was not owing to his client,<sup>7</sup> or that it was not collectable,<sup>8</sup> or that the failure to collect was due to the act of the client,<sup>9</sup> or that the owner of the claim has still a valid and subsisting remedy by which it may be collected.<sup>10</sup> While there are some decisions that hold that the champerty cuts both ways, and that the client, being party to the unlawful agreement, is without legal remedy for

<sup>19</sup> *Crothers v. Lee*, 29 Ala. 337; *C. Aultman & Co. v. Goldsmith*, 84 Iowa 547, 51 N. W. 43.

<sup>20</sup> *Mardis v. Shackelford*, 4 Ala. 493; *Hair v. Glover*, 14 Ala. 500; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

<sup>1</sup> *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

<sup>2</sup> *Smedes v. Elmendorf*, 3 Johns. (N. Y.) 185.

<sup>3</sup> *Mardis v. Shackelford*, 4 Ala. 493. See also *supra*, §§ 326-330.

<sup>4</sup> *Mardis v. Shackelford*, 4 Ala. 493.

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<sup>5</sup> *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274.

<sup>6</sup> *Moorman v. Wood*, 117 Ind. 144, 19 N. E. 739; *Stanton v. Clinton*, 52 Iowa 109, 2 N. W. 1027.

<sup>7</sup> *Jackson v. Tilghman*, 1 Miles (Pa.) 31.

<sup>8</sup> *Marsh v. Whitmore*, 21 Wall. 178, 22 U. S. (L. ed.) 482.

<sup>9</sup> *Ransom v. Cothran*, 6 Smedes & M. (Miss.) 167.

<sup>10</sup> *Huntington v. Rumnill*, 3 Day (Conn.) 390.

anything connected with it, the better doctrine is, that the attorney having received money, the client is entitled to it; the agreement is his defense, and if the agreement is unlawful, the defense fails.<sup>11</sup>

**§ 342. Statute of Limitations.**— In actions charging an attorney with negligence in failing to collect his client's claims, the statute of limitations begins to run after the lapse of a reasonable time in which the claim might either have been collected, or proceedings to enforce such collection might have been instituted; <sup>12</sup> what amounts to a reasonable time in such cases must be determined from the facts.<sup>13</sup> Where a claim is lost through the misconduct or fraud of an attorney with whom a collection agency has intrusted it for collection, and the replies of the agency to inquiries made were calculated to throw the claimants off their guard, the statute of limitations only begins to run against the claimants from the time of their discovery of the fraud.<sup>14</sup>

**§ 343. Damages.**— If a party sustains loss because of the negligence of his attorney in the collection of a debt, the measure of damages is the amount of the loss actually sustained,<sup>15</sup> and not

<sup>11</sup> *Dunne v. Herrick*, 37 Ill. App. 180.

<sup>12</sup> *United States*.—*Wilcox v. Plummer*, 4 Pet. 172, 7 U. S. (L. ed.) 821.

*Alabama*.—*Mardis v. Shackelford*, 4 Ala. 493.

*Kentucky*.—*McArthur v. Baker*, 7 Ky. L. Rep. 441.

*Pennsylvania*.—*Downey v. Garard*, 24 Pa. St. 52; *Morrison v. Mullin*, 34 Pa. St. 17; *Barton v. Dickens*, 48 Pa. St. 518; *Campbell v. Boggs*, 48 Pa. St. 524; *Rhines v. Evans*, 66 Pa. St. 194, 5 Am. Rep. 365.

<sup>13</sup> *Rhines v. Evans*, 66 Pa. St. 194, 5 Am. Rep. 365. See also *McDowell v. Potter*, 8 Pa. St. 189, 49 Am. Dec. 503; *Downey v. Garard*, 24 Pa. St. 52.

<sup>14</sup> *Morgan v. Tener*, 83 Pa. St. 305. And see *infra*, § 351.

<sup>15</sup> *Arkansas*.—*Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262.

*Georgia*.—*Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386.

*Kentucky*.—*Eccles v. Stephenson*, 3 Bibb 517.

*Massachusetts*.—*Dearborn v. Dearborn*, 15 Mass. 316.

*New York*.—*Vooth v. McEachen*, 181 N. Y. 28, 2 Ann. Cas. 601, 73 N. E. 488.

*Vermont*.—*Crooker v. Hutchinson*, 2 D. Chip. 117.

Where an attorney negligently fails, in violation of express instructions from his client, to issue execution upon a judgment, he is liable in any event for nominal damages, and if the judgment could have been collected by execution, and is afterwards lost through the insolvency of

the nominal amount of the demand.<sup>16</sup> Thus it has been held that if an attorney neglects to bring suit on a note placed in his hands for collection, contrary to the directions of his client, and the debt is thereby lost, the attorney is liable in damages for whatever amount might have been recovered had he brought suit at the time he was instructed so to do.<sup>17</sup> Any fact which will tend to reduce the value of the debt below the amount of the claim is proper to be considered by the jury.<sup>18</sup>

*Actions for Money Collected.*

§ 344. **Right to an Accounting.**—An attorney is bound to render an account as to moneys collected by him for his client; and should he refuse to do so, an action to compel such accounting will lie.<sup>19</sup> Nor will the attorney be relieved from this duty merely

the debtor, he is liable for the full amount of the judgment; but if the client discharges the negligent attorney, and the judgment could then have been collected by execution, which the client negligently fails to have issued, and the debtors afterward become insolvent, the attorney is liable only for nominal damages, the negligence of the client being the proximate cause of the loss. *Read v. Patterson*, 11 Lea (Tenn.) 431.

<sup>16</sup> *Cox v. Sullivan*, 7 Ga. 144, 50 Am. Dec. 386; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

<sup>17</sup> *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Cox v. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

<sup>18</sup> *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

<sup>19</sup> *United States*.—*Stanwood v. Wisard*, 128 Fed. 499.

*Alabama*.—*Mardis v. Shackelford*, 6 Ala. 433; *Kirkman v. Vanlier*, 7 Ala. 224.

*Indiana*.—*Bougher v. Scobey*, 16 Ind. 151; *Bougher v. Scobey*, 23 Ind. 583.

*Kentucky*.—*Scott v. Wickliffe*, 1 B. Mon. 353.

*New Jersey*.—*Kelley v. Repetto*, 62 N. J. Eq. 246, 49 Atl. 429.

*New York*.—*Matter of Raby*, 29 App. Div. 225, 51 N. Y. S. 552; *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Pallace v. Niagara, etc., Power Co.*, 131 App. Div. 453, 115 N. Y. S. 340; *Secor v. Tradesmen's Nat. Bank*, 148 App. Div. 141, 133 N. Y. S. 197; *In re Keen*, 39 Misc. 374, 79 N. Y. S. 857; *Tiffany v. Hess*, 67 Misc. 258, 122 N. Y. S. 482, *affirmed* 140 App. Div. 933, 125 N. Y. S. 1147.

*Pennsylvania*.—*McDaniels v. Cutler*, 3 Brews. 57.

*Accounting by Partnership.*—Though in an action at law the representatives of deceased partners cannot be joined as defendants with the surviving partner in an action upon a partnership obligation unless the inability to secure a satisfaction from the surviving partner is shown, yet,

because he has a lien on the fund,<sup>20</sup> or because the fund is, under the client's instructions, to be paid to third persons.<sup>1</sup> Where an attorney is shown to be in possession of his client's money, and is called upon to account, he is bound to show in detail what he has done with it, and to justify its retention or expenditure; and it is not enough for him merely to state in general terms that he has retained it for counsel fees, and for moneys which he has paid out on account of the petitioner.<sup>2</sup> Where counsel was supplied with money to purchase rights of way, and for expenses incurred in securing franchises, and he paid over part thereof to an assistant, to be used for the purposes aforesaid, the fact that the latter verbally accounted to the general counsel in a manner satisfactory to him will not excuse him from accounting in detail to the company, as a condition precedent to recovering for his services.<sup>3</sup> But where an attorney has rendered an account of all moneys or other property coming into his hands, he has fulfilled his entire duty in this respect, and is not liable in a subsequent action for a further accounting.<sup>4</sup> A bill for an accounting will be dismissed on demurrer unless it discloses an equitable cause of action.<sup>5</sup>

**§ 345. Right to Sue.** — One for whom an attorney has collected money may sue him for its recovery.<sup>6</sup> Suits of this char-

where redress is sought in equity for breach of trust by a deceased member of a law firm, all persons affected may be made parties, and hence the surviving partners and the executrices of deceased partners in the firm may be joined as defendants. *Tiffany v. Hess*, 67 Misc. 258, 122 N. Y. S. 482, *affirmed* 140 App. Div. 933, 125 N. Y. S. 1147.

*Effect of Failure to Account.* — That an attorney failed to comply with an order of court requiring him to account to his client, does not warrant the court in treating such failure as a confession of the plaintiff's demand, and entering a judgment against him for such an amount, in the face of a general denial and

counterclaim. *Everett v. Jones*, 32 Utah 489, 91 Pac. 360.

<sup>20</sup> *McCracken v. Harned*, 59 N. J. Eq. 190, 44 Atl. 959.

<sup>1</sup> *Mardis v. Shackelford*, 6 Ala. 433.

<sup>2</sup> *In re Raby*, 29 App. Div. 225, 51 N. Y. S. 552.

<sup>3</sup> *Pallace v. Niagara, etc., Power Co.*, 131 App. Div. 453, 115 N. Y. S. 340.

<sup>4</sup> *Hernandez v. Dart*, 109 La. 880, 33 So. 905.

<sup>5</sup> *Powers v. Cray*, 7 Ga. 206; *Ferree v. United Storage Co.* 207 Pa. St. 41, 75 Atl. 838, wherein it also appears that the relation of attorney and client did not exist.

<sup>6</sup> *Alabama*.—*Mardis v. Shackelford*, 6 Ala. 433.

acter are, of course, usually brought by the client, but they may be maintained by any person entitled to the fund.<sup>7</sup> It is immaterial that the attorney claims a lien upon the fund,<sup>8</sup> or that he had no authority to collect it,<sup>9</sup> or that there is a dispute as to the amount of his fees.<sup>10</sup> Where an attorney at law, at a sale in partition proceedings in which he represented a defendant having a fractional interest in the premises, purchased the property in his own name, and as part payment gave to the sheriff his receipt for his client's interest in the proceeds, it was held, that although the sheriff did not actually receive and pay back to the attorney his client's share of the money, yet the legal effect was the same, and the attorney might be sued by the client for money received for his use.<sup>11</sup> So, where an attorney gave his client a memorandum stating that a judgment had been settled by drafts which he would account for, it will be presumed that he converted the drafts into money, and he will be liable to an action for the amount thereof.<sup>12</sup> But where an attorney collects money belonging jointly to several persons, one of them may not sue alone for the recovery of his share until the amount thereof has been determined;<sup>13</sup> and where the professional relation involves a series of acts and duties, the attorney may not be sued with respect thereto until the relation

*Arkansas*.—Burke v. Stillwell, 23 Ark. 294; Maloney v. Terry, 70 Ark. 189, 66 S. W. 919, 72 S. W. 570.

*Indiana*.—Bougher v. Scobey, 16 Ind. 151.

*Kentucky*.—Ellis v. Henry, 5 J. J. Marsh. 247.

*Maine*.—Newcastle v. Bellard, 3 Greenl. 369.

*Michigan*.—Robinson v. Hawes, 56 Mich. 135, 22 N. W. 222.

*New York*.—Beardsley v. Root, 11 Johns. 465, 6 Am. Dec. 386; Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608.

*Pennsylvania*.—Szok v. Crown, 33 Pa. Super. Ct. 612; Coleman v. Tim, 18 N. Y. C. 240.

*South Dakota*.—Jones v. Winsor, 22 S. D. 480, 118 N. W. 716.

*Tennessee*.—Smith v. Owen, 7 Lea 53.

<sup>7</sup> Mardis v. Shackleford, 6 Ala. 433. And see *supra*, § 299.

<sup>8</sup> Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605.

<sup>9</sup> McFarland v. Crary, 8 Cow. (N. Y.) 253; Smith v. Owen, 7 Lea (Tenn.) 53.

<sup>10</sup> Robinson v. Hawes, 56 Mich. 135, 22 N. W. 222; Szok v. Crown, 33 Pa. Super. Ct. 612.

<sup>11</sup> Sullivan v. Grace, 5 Mo. App. 594.

<sup>12</sup> Burke v. Stillwell, 23 Ark. 294.

<sup>13</sup> Jackson v. Moore, 72 App. Div. 217, 76 N. Y. S. 164.

has been dissolved.<sup>14</sup> So, where an administrator paid over the balance in his hands to the attorney for the distributees, with directions to hold it in trust for them, but not to pay it to them until they executed releases, they cannot maintain a proceeding to require the attorney to pay over their respective shares without first tendering the required releases, in compliance with the condition precedent so imposed.<sup>15</sup> The liability of an attorney for failure to pay over money collected for his client,<sup>16</sup> or held by him for other persons,<sup>17</sup> has been considered heretofore.

**§ 346. Necessity of Making Demand Prior to Bringing Suit.**—While it is undoubtedly the duty of an attorney to notify and pay over to his client such moneys as he may have collected,<sup>18</sup> the general rule is that a suit cannot be maintained for the recovery thereof until payment has been demanded by the client, unless such demand has been waived by the attorney.<sup>19</sup> But a prior demand for payment is not essential where the attorney neglects to notify his client of the collection of the money

<sup>14</sup> *Glenn v. Cuttle*, 2 Grant Cas. (Pa.) 273.

<sup>15</sup> *In re Smyley*, 64 Hun 639 mem., 19 N. Y. S. 266.

<sup>16</sup> See *supra*, § 328.

<sup>17</sup> See *supra*, § 299.

<sup>18</sup> See *supra*, § 328.

<sup>19</sup> *United States*.—*Sneed v. Hanly*, Hempst. 659, 22 Fed. Cas. No. 13, 136.

*Alabama*.—*Mardis v. Schackleford*, 4 Ala. 493.

*Arkansas*.—*Cummins v. McLain*, 2 Ark. 402; *Palmer v. Ashley*, 3 Ark. 75; *Denton v. Embury*, 10 Ark. 228; *Jett v. Hempstead*, 25 Ark. 462.

*Indiana*.—*Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362; *Pierse v. Thornton*, 44 Ind. 235; *Kyser v. Wells*, 60 Ind. 261; *Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382; *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605. See also *Bougher v. Scobey*, 23 Ind. 583.

*Kansas*.—*Voss v. Bachop*, 5 Kan. 59.

*Kentucky*.—*Roberts v. Armstrong*, 1 Bush 263, 89 Am. Dec. 624; *Cord v. Taylor*, 5 Ky. L. Rep. 852.

*Missouri*.—*Beardslee v. Boyd*, 37 Mo. 180.

*New York*.—*Satterlee v. Frazer*, 4 Sandf. 141; *People v. Brotherson*, 36 Barb. 662; *Taylor v. Bates*, 5 Cow. 376; *Ex p. Ferguson*, 6 Cow. 596; *McFarland v. Crary*, 8 Cow. 253; *Rathbun v. Ingals*, 7 Wend. 320; *Banner v. D'Auby*, 34 Misc. 525, 69 N. Y. S. 891.

*Pennsylvania*.—*Glenn v. Cuttle*, 2 Grant Cas. 273.

*South Carolina*.—*Madden v. Watts*, 59 S. C. 81, 37 S. E. 209.

A demand on one of several partners is equivalent to a demand on all. *McFarland v. Crary*, 8 Cow. (N. Y.) 253.



within a reasonable time,<sup>20</sup> or where he denies the right of his client to the fund,<sup>1</sup> or sets up a claim thereto exceeding the amount collected,<sup>2</sup> or converts the fund to his own use,<sup>3</sup> or where he agreed to pay it over when collected and failed to do so,<sup>4</sup> or where his collection of the fund was unauthorized,<sup>5</sup> or where the fund was collected under a contract which was void as against public policy.<sup>6</sup> In some jurisdictions no preliminary demand is necessary,<sup>7</sup> the commencement of the action being deemed a sufficient demand in itself.<sup>8</sup> Nor is a demand necessary for the recovery of choses in action held by an attorney as trustee for his client.<sup>9</sup>

§ 347. Form of Action. — The duty of an attorney to pay over money collected by him for his client rests in contract,<sup>10</sup> and is usually enforced by the common-law action of assumpsit, or its equivalent under modern forms of pleading.<sup>11</sup> Thus the action may be brought for money had and received,<sup>12</sup> or account rendered.<sup>13</sup> But, excepting for the purpose of compelling an account-

<sup>20</sup> *Denton v. Embury*, 10 Ark. 228; *Jett v. Hempstead*, 25 Ark. 462; *Chapman v. Burt*, 77 Ill. 337; *Glenn v. Cuttle*, 2 Grant Cas. (Pa.) 273.

<sup>1</sup> *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508.

<sup>2</sup> *Walradt v. Maynard*, 3 Barb. (N. Y.) 584; *Rathbun v. Ingals*, 7 Wend. (N. Y.) 320; *Krause v. Dorrance*, 10 Pa. St. 462, 51 Am. Dec. 496.

<sup>3</sup> *Chapman v. Burt*, 77 Ill. 337.

*Contra* *Kyser v. Wells*, 60 Ind. 261.

<sup>4</sup> *Mardis v. Shackleford*, 4 Ala. 493.

<sup>5</sup> *Mowery v. Webb*, 6 Ky. L. Rep. 360.

<sup>6</sup> *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

<sup>7</sup> *Shepherd v. Crawford*, 71 Ga. 458; *Coffin v. Coffin*, 7 Me. 298, *overruling* *Staples v. Staples*, 4 Me. 532.

<sup>8</sup> *Hollenbeck v. Stanberry*, 38 Ia. 325.

<sup>9</sup> *Metz v. Abney*, 64 S. C. 254, 42 S. E. 103.

<sup>10</sup> *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164.

<sup>11</sup> *Ellis v. Henry*, 5 J. J. Marsh, (Ky.) 247; *Sackett v. Breen*, 50 Hun 602, 3 N. Y. S. 473; *Campbell v. Boggs*, 12 Wright (Pa.) 524; *Albright v. Mercer*, 14 Pa. Super. Ct. 63; *Palmer v. Thomson*, 4 Rich. L. (S. C.) 607.

<sup>12</sup> *Cameron v. Clarke*, 11 Ala. 259; *Houx v. Russell*, 10 Mo. 246.

<sup>13</sup> *Bredin v. Kingland*, 4 Watts (Pa.) 420. But see *Albright v. Mercer*, 14 Pa. Super. Ct. 63. And see *supra*, § 344.

*Book Account.*—Money collected by an attorney upon demands left with him for collection cannot ordinarily be recovered from him by the creditor in book account. But, if the parties agree that the money so received may be charged upon book, the objection will be obviated, and such agree-

ing,<sup>14</sup> a bill in equity will not lie.<sup>15</sup> If there has been a conversion of the fund by the attorney, the action for its recovery may sound in tort;<sup>16</sup> but, ordinarily, conversion cannot be predicated on the mere failure to pay the money over, or on the fact that it was deposited in bank in the attorney's name.<sup>17</sup> Under some statutes, however, an attorney who neglects to comply within a reasonable time with his client's demand for money and papers belonging to the client, but held by the attorney, is guilty of professional misconduct, and is liable as for a misdemeanor, or in an action of tort, except so far as the papers and moneys are subject to the attorney's lien for his professional services;<sup>18</sup> but, even in such case, an attorney's retention in good faith of moneys held by him for his client, pending the settlement of an honest disagreement between them as to the amount justly due for the attorney's services, is not professional misconduct or a violation of professional duty, and does not make him liable in trover to the client.<sup>19</sup>

**§ 348. Pleading.**—The complaint should state all the facts essential to a recovery.<sup>20</sup> Thus it should be alleged that the attorney was retained to, and did, collect a certain sum, which he

ment may also be implied from the course of dealing between the parties. *Scott v. Lance*, 21 Vt. 507. See also *Smalley v. Soragen*, 30 Vt. 2.

<sup>14</sup> See *supra*, § 344.

<sup>15</sup> *Marsh v. Whitmore*, 1 Hask. 391, 16 Fed. Cas. No. 9,122; *Crothers v. Lee*, 29 Ala. 337; *Pfau v. Fullenwider*, 102 Ill. App. 499.

<sup>16</sup> *Connecticut*.—*Pratt v. Brewster*, 52 Conn. 65.

*Illinois*.—*Tinkham v. Heyworth*, 31 Ill. 519.

*Indiana*.—*Clegg v. Baumberger*, 110 Ind. 539, 9 N. E. 700.

*New York*.—*Stage v. Stevens*, 1 Denio 267; *Yates v. Blodgett*, 8 How. Pr. 278; *Sinclair v. Higgins*, 111 App. Div. 206, 97 N. Y. S. 415.

*South Dakota*.—See *Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716.

*Texas*.—See *Flanagan v. Pearson*, 42 Tex. 1, 19 Am. Rep. 40.

<sup>17</sup> *Jackson v. Moore*, 72 App. Div. 217, 76 N. Y. S. 164; *Gopen v. Crawford*, 53 How. Pr. (N. Y.) 278; *Pierce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774.

<sup>18</sup> *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

<sup>19</sup> *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

<sup>20</sup> *Chappell v. Hawkins*, 30 Ga. 756; *Goss Printing Press Co. v. Todd*, 202 Mass. 185, 88 N. E. 780; *Grinnell v. Sherman*, 60 Hun 578 mem., 14 N. Y. S. 544.

failed to pay over to the plaintiff,<sup>21</sup> though demand therefor was duly made upon him; or, if there has been no demand, facts constituting a waiver thereof should be alleged;<sup>1</sup> where, however, a demand is not necessary prior to the institution of suit,<sup>2</sup> it need not be alleged.<sup>3</sup> Nor is the plaintiff bound to furnish a bill of particulars unless so ordered.<sup>4</sup>

**§ 349. Proof.**—It is essential that the plaintiff should prove the employment of the attorney for the purpose of making the collection;<sup>5</sup> that the collection was, in fact, made;<sup>6</sup> and, where a

<sup>21</sup> *Arkansas*.—*Cummins v. McLain*, 2 Ark. 413; *Peay v. Ringo*, 22 Ark. 68.

*California*.—*Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833.

*Kansas*.—*Dobbs v. Campbell*, 66 Kan. 805, 72 Pac. 273.

*Maine*.—*Wilson v. Russ*, 20 Me. 421.

*Nebraska*.—*Fletcher v. Cummings*, 33 Neb. 793, 51 N. W. 144.

<sup>1</sup> *Alabama*.—*Mardis v. Shackelford*, 4 Ala. 493; *Macdonald v. State*, 143 Ala. 101, 39 So. 257; *McCarley v. White*, 144 Ala. 662, 39 So. 978.

*Arkansas*.—*Cummins v. McLain*, 2 Ark. 402; *Denton v. Embury*, 10 Ark. 228; *Leigh v. Williams*, 64 Ark. 165, 41 S. W. 323.

*California*.—*Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

*Indiana*.—*Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362; *Walpole v. Bishop*, 31 Ind. 156; *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605.

*Iowa*.—*Johnson v. Semple*, 31 Ia. 49.

*Kentucky*.—*Ellis v. Henry*, 5 J. J. Marsh. 248.

*Michigan*.—*Pierce v. Underwood*, 103 Mich. 62, 61 N. W. 344.

*Missouri*.—*Beardslee v. Boyd*, 37 Mo. 180.

*Nebraska*.—*Fletcher v. Cummings*, 33 Neb. 793, 51 N. W. 144.

*New York*.—*Starr v. Vanderheyden*, 9 Johns. 253, 6 Am. Dec. 275; *Taylor v. Bates*, 5 Cow. 376; *Rathbun v. Ingals*, 7 Wend. 320; *Bohanan v. Peterson*, 9 Wend. 503; *Walradt v. Maynard*, 3 Barb. 584; *Reed v. Hayward*, 82 App. Div. 416, 81 N. Y. S. 608; *Cartier v. Spooner*, 118 App. Div. 342, 103 N. Y. S. 505; *Banner v. D'Auby*, 34 Misc. 525, 69 N. Y. S. 891.

*South Carolina*.—*Madden v. Watts*, 59 S. C. 81, 37 S. E. 209; *Metz v. Abney*, 64 S. C. 254, 42 S. E. 103.

*Utah*.—*Everett v. Jones*, 32 Utah 489, 91 Pac. 360.

<sup>2</sup> See *supra*, § 346 notes.

<sup>3</sup> *Shepherd v. Crawford*, 71 Ga. 458.

<sup>4</sup> *West v. Brewster*, 1 Duer (N. Y.) 647.

<sup>5</sup> *Wellenbrock v. Speckert*, 55 S. W. 200, 21 Ky. L. Rep. 1369; *Prusa v. Everett*, 86 Neb. 456, 125 N. W. 1076; *Forety v. Jordan*, 2 Robt. (N. Y.) 319.

Proof that an attorney represented the holder of a note in an action thereon, is sufficient evidence that it was placed in his hands for collection. *Bonnell v. Prince*, 11 Tex. Civ. App. 399, 32 S. W. 855.

<sup>6</sup> *Wilson v. Russ*, 20 Me. 421; *Kuhn*

demand is a condition precedent to suit,<sup>7</sup> the fact that such a demand was made,<sup>8</sup> and that the attorney refused to pay over the fund to his client; and any other fact which, under the circumstances, may be essential to recovery.<sup>9</sup> A conflict of evidence presents a question of fact for the jury.<sup>10</sup>

**§ 350. Defenses Generally.**—Where the plaintiff presents a *prima facie* case, the burden of establishing his defense rests, of course, upon an attorney who has been sued because of his failure to pay over money collected for his client.<sup>11</sup> As to what constitutes a good defense, and what is available for that purpose, the facts in each case must speak for themselves. The attorney may

*v. Hunt*, 2 Brev. (S. C.) 164; *Hall v. Wright*, 9 Rich. L. (S. C.) 392.

In an action against an attorney to compel him to account for notes put in his hands for collection, his failure to produce or make any explanation concerning them, was held to be evidence that the money had been collected and misused, and that he was properly charged therewith. *Wiley v. Logan*, 95 N. C. 358.

Where an attorney, upon his client's demanding twenty dollars collected by him on a chattel mortgage, wrote in reply that as soon as he collected the remainder he would "straighten up," there is sufficient proof of his having collected the twenty dollars. *Mahler v. Hyman*, 17 N. Y. S. 588.

<sup>7</sup> See *supra*, § 346.

<sup>8</sup> *Satterlee v. Frazer*, 2 Sandf. (N. Y.) 141; *Banner v. D'Auby*, 34 Misc. 525, 69 N. Y. S. 891.

*Demand Presumed.*—In the absence of proof, it will be presumed that an attorney, having collected money, gave notice thereof, and the client made demand therefor, within a reasonable time. *Voss v. Bachop*, 5 Kan. 59.

<sup>9</sup> *German v. Brown*, 145 Ala. 364, 39 So. 742; *Ross v. Gerrish*, 8 Allen (Mass.) 147.

Evidence held insufficient to warrant a finding that defendant had received more than he had accounted for to complainant. *Sawdey v. Barnes*, (Wash.) 132 Pac. 225.

<sup>10</sup> *Boyett v. Payne*, 141 Ala. 475, 37 So. 585; *Gray v. Conyers*, 70 Ga. 349; *C. Aultman & Co. v. Goldsmith*, 84 Iowa 547, 51 N. W. 43; *Shoemaker v. Stiles*, 102 Pa. St. 549.

<sup>11</sup> *California.*—*McRaven v. Dameron*, 82 Cal. 57, 23 Pac. 33.

*Georgia.*—*Shepherd v. Crawford*, 71 Ga. 458.

*Iowa.*—*Shropshire v. Ryan*, 111 Ia. 677, 82 N. W. 1035; *Youngerman v. Pugh*, 125 N. W. 321.

*Maine.*—*Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, 9 L.R.A. 90.

*Massachusetts.*—*Illustrated Card, etc., Co. v. Dolan*, 208 Mass. 53, 94 N. E. 299.

*Michigan.*—*Reynolds v. Cavanagh*, 139 Mich. 387, 102 N. W. 986, 11 Detroit Leg. N. 901.

*Nebraska.*—*Hamilton v. Allen*, 86 Neb. 401, 125 N. W. 610, 28 L.R.A. (N.S.) 723.

show that he was compelled to pay over the money in garnishment proceedings,<sup>12</sup> but it is no defense to show that he was notified, by persons claiming to be interested in the fund, not to pay over the money collected to the plaintiff.<sup>13</sup> Nor can an attorney defend on the ground that the money received by him should have been paid to another person instead,<sup>14</sup> or that there is a motion pending which seeks, summarily, to compel him to pay over the money for which the suit was brought,<sup>15</sup> or that he himself is also a creditor of the person paying the money,<sup>16</sup> or that the plaintiff corporation, for whom the fund was collected, was not duly incorporated,<sup>17</sup> or that his client's interest in the fund was illegally acquired,<sup>18</sup> or that the client is not the owner of the fund,<sup>19</sup> or that he tendered payment in depreciated currency.<sup>20</sup> The fact that a client executed a satisfaction of a mortgage in the hands of her attorney for collection, does not raise a presumption that the attorney has accounted to her for the money collected by him.<sup>1</sup> So, a client who accepts a check and uses the same as part payment on account, may sue for the balance due, notwithstanding the fact that

*New York*.—In re Raby, 29 App. Div. 225, 51 N. Y. S. 552; Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608; Weber v. Werner, 138 App. Div. 127, 122 N. Y. S. 943; Harkavy v. Zisman, 96 N. Y. S. 214.

<sup>12</sup> Scott v. Kirchbaum, 47 Neb. 331, 66 N. W. 443. See also *supra*, § 301.

<sup>13</sup> Jacobson v. Jones, 128 Ill. App. 55; Dunn v. Vannerson, 7 How. (Miss.) 579. But see *supra*, § 328 note.

*Payment to Attorney by Mistake*.—Where, with full knowledge of the facts, and under a misapprehension only as to the law, one procures the issuance of an execution, purchases the property at a sale thereunder, and pays the money to the attorney of the execution creditor, the latter is entitled to recover it from his at-

torney. Hendrix v. Wright, 50 Mo. 311.

<sup>14</sup> In re Silvernail, 45 Hun 575, 10 N. Y. St. Rep. 588.

<sup>15</sup> Coopwood v. Baldwin, 25 Miss. 129; Reilly v. Provost, 98 App. Div. 208, 90 N. Y. S. 591; Shanley v. McManus, 124 App. Div. 935, 109 N. Y. S. 434.

<sup>16</sup> Wilder v. Millard, (Neb.) 141 N. W. 156.

<sup>17</sup> McMath v. Com., 12 Ky. L. Rep. 251.

<sup>18</sup> Fogerty v. Jordan, 2 Robt. (N. Y.) 319.

<sup>19</sup> Case v. Ranney, (Mich.) 140 N. W. 943; Mahler v. Hyman, 17 N. Y. S. 588.

<sup>20</sup> Van Vacter v. Brewster, 1 Smedes & M. (Miss.) 400.

<sup>1</sup> Douglass v. Murray, 26 N. Y. Wkly. Dig. 339.

the attorney claimed the check was payment in full.<sup>2</sup> Nor does the fact that a check received in payment was turned over to the client, relieve the attorney for his failure to account for the proceeds thereof, if it was subsequently, after indorsement by the client, returned to him to be collected, and to deduct his charges and disbursements.<sup>3</sup> So, an attorney is estopped to deny that he represented one for whom he acted without authority.<sup>4</sup> And an attorney who has rendered an account to his client covering several years, admitting a balance due, is estopped from pleading mistakes in his favor as an equitable defense when sued therefor.<sup>5</sup> Where an attorney received money from his client which it was afterwards agreed should be applied to the attorney's claim for legal services, the attorney, when sued for an accounting, was entitled to a credit for the amount of his bill for services.<sup>6</sup> Where an attorney, for a consideration, fraudulently agreed to the dismissal of his client's action, it was immaterial to her right to an accounting and relief against the attorney whether she had a good cause of action in the case dismissed.<sup>7</sup>

§ 351. Statute of Limitations. — An attorney who has been sued for a sum collected for a client may, undoubtedly, set up the statute of limitations in bar of a recovery,<sup>8</sup> the only question being as to when the statute begins to run. In several jurisdictions the rule is that, in the absence of misrepresentation or fraudulent concealment on the part of the attorney, the statute begins to run from the time the collection was made, or from the expiration of a reasonable time thereafter;<sup>9</sup> while in other jurisdictions the rule

<sup>2</sup> *Szok v. Crown*, 33 Pa. Super. Ct. 612.

<sup>3</sup> *Weber v. Werner*, 138 App. Div. 127, 122 N. Y. S. 943.

<sup>4</sup> *McFarland v. Crary*, 8 Cow. (N. Y.) 253.

<sup>5</sup> *Cannon v. Sanford*, 20 Mo. App. 590.

<sup>6</sup> *French v. Armstrong*, 79 N. J. Eq. 289, 82 Atl. 331.

<sup>7</sup> *Kelly v. Allin*, 212 Mass. 327, 99 N. E. 273.

<sup>8</sup> *Arkansas*.—*Denton v. Embury*, 10 Ark. 228.

*Kansas*.—*Voss v. Bachop*, 5 Kan. 59.

*Mississippi*.—*Cook v. Rives*, 13 Smedes & M. 328, 53 Am. Dec. 88.

*Pennsylvania*.—*Downey v. Garard*, 24 Pa. St. 52.

*Virginia*.—*Kinney v. McClure*, 1 Rand. 287.

<sup>9</sup> *District of Columbia*.—*Campbell v. Wilson*, 2 Mackey 497; *Jackson v. Combs*, 7 Mackey 608, 1 L.R.A. 742.

is that the statute does not begin to run until payment has been demanded by the client.<sup>10</sup> In some states, while it is conceded that an action cannot be maintained against an attorney for money collected by him, as such, until demand and refusal to pay over, or neglect of the attorney to notify his client of the collection, yet the rule prevails that where the client has notice of the collection he must make his demand within a reasonable time, and if he neglects to do so he puts in motion the statute of limitations. And where the client could with ordinary diligence have known of the collection, the statute begins to run after the lapse of a reasonable time for demand.<sup>11</sup> The New York code substantially pro-

*Illinois*.—*Cagwin v. Ball*, 2 Ill. App. 70.

*Maine*.—*Coffin v. Coffin*, 7 Greenl. 298, *limiting* *Staples v. Staples*, 4 Greenl. 532.

*Minnesota*.—*Mast v. Easton*, 33 Minn. 161, 22 N. W. 253.

*Mississippi*.—See *Cook v. Rives*, 13 Smedes & M. 329, 53 Am. Dec. 88; *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885.

*Nebraska*.—*Campbell v. Roe*, 32 Neb. 345, 49 N. W. 452.

*Ohio*.—*Douglas v. Corry*, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

*Pennsylvania*.—*Downey v. Garard*, 24 Pa. St. 52; *Campbell v. Boggs*, 48 Pa. St. 524, *sub nom.* *Glenn v. Cuttle*, 2 Grant Cas. 273, *qualifying* *McDowell v. Potter*, 8 Pa. St. 189, 49 Am. Dec. 503, and *overruling* in effect contrary dictum in *Derrickson v. Cady*, 7 Pa. St. 27. See also *Rhines v. Evans*, 66 Pa. St. 195, 5 Am. Rep. 364.

*Tennessee*.—*Hawkins v. Walker*, 4 Yerg. 188.

<sup>10</sup> *Sneed v. Hanly*, Hempst. 659, 22 Fed. Cas. No. 13,136; *Voss v. Bachop*, 5 Kan. 59; *Cord v. Taylor*, 5 Ky. L. Rep. 852; *Roberts v. Armstrong*, 1

*Bush* (Ky.) 263, 89 Am. Dec. 624; *Waring v. Richardson*, 33 N. C. 77; *Hyman v. Gray*, 49 N. C. 155; *Egerton v. Logan*, 81 N. C. 172; *Knight v. Killebrew*, 86 N. C. 400. See also *Bryant v. Peebles*, 92 N. C. 176; *Lever v. Lever*, 1 Hill Eq. (S. C.) 62. And see *supra*, § 346, as to the necessity of a demand.

The reason of this view is stated in *Sneed v. Hanly*, Hempst. 659, 22 Fed. Cas. No. 13,136, wherein the court said: "For the protection of the attorney, the law is settled that he is not subject to an action as to moneys collected, nor to interest on such moneys, until the trust is ended by some of the means indicated [demand or directions to remit]. The cause of action accrues at that point of time; and as it would be unjust to subject an attorney to an action before he is thus put in default, so, on the other hand, it would be equally unjust to allow him to obtain an advantage over his client, while trust relations exist between them."

<sup>11</sup> *Alabama*.—See *Brombery v. Sands*, 127 Ala. 411, 30 So. 510, *following* *Kimbrow v. Waller*, 21 Ala. 376.

*Arkansas*.—*Jett v. Hempstead*, 25

vides that the statute of limitations does not begin to run until the client has actual knowledge of the fact that the collection has been made.<sup>12</sup> Notwithstanding these differences, however, it is universally held that, whenever the attorney, by misrepresentation or fraud, conceals the fact that collection has been effected, the statute does not begin to run until the client receives knowledge that the attorney has made the collection, or until the time when reasonable diligence would have discovered that fact.<sup>13</sup> The running of the statute may, of course, be tolled in cases of this character as effectively as in other cases.<sup>14</sup>

Ark. 462, *limiting* *Denton v. Embury*, 10 Ark. 229; *Whitehead v. Wells*, 29 Ark. 99; *Leigh v. Williams*, 64 Ark. 165, 41 S. W. 323.

*Georgia*.—*Schofield v. Woolley*, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315. See also *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.

*Missouri*.—*McClurg v. Hill*, 7 Mo. App. 579; *Donahue v. Bragg*, 49 Mo. App. 273. See also *Carder v. Primm*, 52 Mo. App. 102, *disapproving* *Aultmann, etc., Co. v. Adams*, 35 Mo. App. 503.

<sup>12</sup> N. Y. Code Civ. Pro. § 410 (1). See also *Bronson v. Munson*, 29 Hun 54; *Christ v. Chetwood*, 1 Misc. 418, 20 N. Y. S. 841, *affirmed* 3 Misc. 614, 22 N. Y. S. 1133, 3 Misc. 640, 23 N. Y. S. 1160. See also *Birkhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107; *Grinnell v. Sherman*, 60 Hun 578 mem., 14 N. Y. S. 544; *Wood v. Young*, 141 N. Y. 218, 36 N. E. 193.

<sup>13</sup> *United States*.—*Birkhead v. De Forest*, 120 Fed. 645, 57 C. C. A. 107.

*Alabama*.—*Porter v. Smith*, 65 Ala. 169.

*Arkansas*.—*Jett v. Hempstead*, 25 Ark. 462.

*Illinois*.—*Fortune v. English*, 226 Ill. 262, 9 Ann. Cas. 77, 80 N. E. 781,

117 Am. St. Rep. 253, 12 L.R.A. (N.S.) 1005.

*Iowa*.—*Wilder v. Secor*, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236.

*Kansas*.—*Voss v. Bachop*, 5 Kan. 59; *Stinson v. Aultman, etc., Co.*, 54 Kan. 537, 38 Pac. 788.

*Mississippi*.—*Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885, decided under statute of limitations expressly excepting fraudulent concealment, and refusing to follow *Cook v. Rives*, 13 Smedes & M. 329, 53 Am. Dec. 88, wherein, in the absence of such an express exception, it was held that fraudulent concealment did not prevent the running of the statute.

*Missouri*.—*Aultman, etc., Co. v. Adams*, 35 Mo. App. 503; *Aultman, etc., Co. v. Loring*, 76 Mo. App. 66.

*New York*.—*Bronson v. Munson*, 29 Hun 54.

*Pennsylvania*.—*McDowell v. Potter*, 8 Pa. St. 189, 49 Am. Dec. 503, explained in *Campbell v. Boggs*, 48 Pa. St. 524; *Morgan v. Tener*, 83 Pa. St. 305; *Wickersham v. Lee*, 83 Pa. St. 416; *Glenn v. Cuttle*, 2 Grant Cas. 273. See also *McCoon v. Galbraith*, 29 Pa. St. 293.

*Texas*.—*Bonner v. McCreary*, 35 S. W. 197.

<sup>14</sup> *Torrence v. Strong*, 4 Ore. 39.



**§ 352. Set-Off and Counterclaim.** — The attorney may also allege in his defense any set-off or counterclaim which he may have,<sup>15</sup> such, for instance, as a lien,<sup>16</sup> or other claim for compensation;<sup>17</sup> and it has been held that this defense may be proved under the general issue.<sup>18</sup> But where the case has been tried in the court below on another theory, the defendant cannot, on appeal, claim an attorney's lien as his defense.<sup>19</sup>

**§ 353. Recovery.** — The amount of the recovery is usually the sum collected<sup>20</sup> and interest thereon from the time the fund should have been paid over to the client,<sup>1</sup> less any sum due the

<sup>15</sup> *Scobey v. Ross*, 5 Ind. 445; *Noble v. Leary*, 37 Ind. 186.

<sup>16</sup> *Reynolds v. Cavanagh*, 139 Mich. 387, 102 N. W. 986, 11 Detroit Leg. N. 901; *Patrick v. Hazen*, 10 Vt. 183.

<sup>17</sup> *District of Columbia*.—*Dale v. Richards*, 21 D. C. 312.

*Illinois*.—*Bingham v. Spruill*, 97 Ill. App. 374.

*Indiana*.—*Scobey v. Ross*, 5 Ind. 445.

*Kentucky*.—*Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112.

*Missouri*.—*Jenkins v. Clopton*, 141 Mo. App. 74, 121 S. W. 759.

*New York*.—*Weber v. Manheimer*, 23 Misc. 157, 50 N. Y. S. 668; *Gopen v. Crawford*, 53 How. Pr. 278.

*Ohio*.—*Fargo Gaslight & Coke Co. v. Greer*, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589.

*Tennessee*.—*Foster v. Jackson*, 8 Baxt. 433.

*Vermont*.—*Patrick v. Hazen*, 10 Vt. 183.

Where the client died, and afterwards the attorneys collected the money, it was held that, in the administrator's suit to recover the money from them, they could not set off the sum due for their services before the client's death, but might for those

rendered afterwards. *Lewis v. Kinealy*, 2 Mo. App. 33.

As to evidence of difficulty of case as corroborating attorney's testimony as to compensation agreement, see *Brock v. Brock*, 47 Pa. Super. Ct. 321.

<sup>18</sup> *Patrick v. Hazen*, 10 Vt. 183.

<sup>19</sup> *Armitage v. Sullivan*, 69 Iowa 426, 29 N. W. 399.

<sup>20</sup> *Nisbet v. Lawson*, 1 Ga. 275; *Commonwealth Bank v. Patton*, 4 J. J. Marsh. (Ky.) 190; *Smalley v. Soragen*, 30 Vt. 2.

<sup>1</sup> As a general rule, an attorney is only chargeable with interest on sums collected for his client where, after demand, he has refused to pay it over; or where he has concealed the fact of the collection, or used the fund for his own purposes, or has been guilty of some other wrong in connection with the collection thereof.

*United States*.—*Sneed v. Hanly*, Hempst. 659, 22 Fed. Cas. No. 13,138.

*Alabama*.—*Smith v. Alexander*, 87 Ala. 387, 6 So. 51.

*California*.—*Andrews v. Wilbur*, 41 Pac. 790.

*Georgia*.—*Nisbet v. Lawson*, 1 Ga. 275.

attorney by way of set-off or counterclaim,<sup>3</sup> with interest thereon,<sup>3</sup> though frequently the facts in each case must be consulted as to the measure of damages.<sup>4</sup>

*Summary Proceedings.*

§ 354. Right to Proceed Summarily for Recovery of Money. — The duty of an attorney to pay over money collected for his client may be enforced summarily,<sup>5</sup> and the same power

*Illinois.*—Chapman v. Burt, 77 Ill. 337; Ketcham v. Thorp, 91 Ill. 611.

*Indiana.*—Walpole v. Bishop, 31 Ind. 156.

*Iowa.*—Mansfield v. Wilkerson, 26 Iowa 482; Johnson v. Semple, 31 Iowa 49.

*Kentucky.*—Goodlin v. Hays, 88 S. W. 1101, 28 Ky. L. Rep. 112; Cord v. Taylor, 5 Ky. L. Rep. 852.

*Louisiana.*—Dwight v. Simon, 4 La. Ann. 490.

*New York.*—Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340; Harkavy v. Zisman, 96 N. Y. S. 214.

*Ohio.*—State v. Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

*Vermont.*—Hauxhurst v. Hovey, 26 Vt. 544.

*Virginia.*—Rootes v. Stone, 2 Leigh 650.

<sup>3</sup> Hover v. Heath, 3 Hun (N. Y.) 283. And see the preceding section.

<sup>3</sup> Hover v. Heath, 3 Hun (N. Y.) 283, 5 Thomp. & C. 488.

<sup>4</sup> See Jordan v. Davis, 172 Mo. 599, 72 S. W. 686.

Property taken in payment. Kelly v. Allin, 212 Mass. 327, 99 N. E. 273.

<sup>5</sup> United States.—Jeffries v. Laurie, 23 Fed. 786, 27 Fed. 195.

*Alabama.*—Boyett v. Payne, 141 Ala. 475, 37 So. 585; MacDonald v. State, 143 Ala. 101, 39 So. 257.

*Colorado.*—Ex p. Browne, 2 Colo. 553.

*Georgia.*—Murphy v. Justices, 11 Ga. 331; Foster v. Reid, 58 Ga. 221; Haygood v. McKenzie, 119 Ga. 466, 46 S. E. 624; Haden v. Lovett, 133 Ga. 388, 18 Ann. Cas. 114, 65 S. E. 853; Lane v. Brinson, 12 Ga. App. 760, 78 S. E. 725.

*Iowa.*—Cross v. Ackley, 40 Ia. 493; Downs v. Davis, 113 Ia. 529, 85 N. W. 781; Union Bldg. & Sav. Assoc. v. Soderquist, 115 Ia. 695, 87 N. W. 433; Emanuel v. Cooper, 153 Ia. 572, 133 N. W. 1064; Buttery v. Wright, 117 N. W. 31.

*Kentucky.*—Scott v. Wickliffe, 1 B. Mon. 353; Thomas v. Roberts, 5 Dana 189; Board of Education of Mercer County v. Allin, 134 Ky. 763, 121 S. W. 676.

*Minnesota.*—Landro v. Great Northern R. Co., 141 N. W. 1103.

*Mississippi.*—Dunn v. Vannerson, 7 How. 579.

*Missouri.*—State v. Clopton, 15 Mo. App. 589.

*New Jersey.*—Mundy v. Schantz, 52 N. J. Eq. 744, 30 Atl. 322.

*New York.*—Ex p. Statts, 4 Cow.

exists as to an unexpended surplus of expense money received from the client.<sup>6</sup> Jurisdiction of this character rests upon the ground that attorneys are officers of the courts wherein they practice—part of the machinery of the law created for the due administration of justice—and, therefore, when it appears that an attorney has received, in his professional capacity, any moneys which his duty requires him to pay over to his client, the court, if necessary, will exercise its summary power to compel him to do so.<sup>7</sup> In the absence of statutory regulation, which exists in several states,<sup>8</sup> summary proceedings are addressed to the sound discretion of the

76; *People v. Smith*, 3 Caines 221, Col. & C. Cas. 497; *In re Grant*, 17 How. Pr. 260, 8 Abb. Pr. 357; *Saxton v. Wyckoff*, 6 Paige 182; *Barry v. Whitney*, 3 Sandf. 696; *In re Friedman*, 27 Hun 301; *In re Mertian*, 29 Hun 459; *In re Silvernail*, 45 Hun 575, 10 N. Y. St. Rep. 588; *In re H —*, 87 N. Y. 521; *Forstman v. Schulting*, 108 N. Y. 110, 15 N. E. 366; *Matter of Lexington Ave.*, 30 App. Div. 602, 52 N. Y. S. 203, *affirmed* without opinion 17 N. Y. 678, 51 N. E. 1092; *Pritchard v. Marvin*, 33 App. Div. 639, 56 N. Y. S. 974, *affirmed* 158 N. Y. 667, 53 N. E. 1131; *Dailey v. Wellbrock*, 65 App. Div. 523, 72 N. Y. S. 848; *In re Pollock*, 69 App. Div. 499, 74 N. Y. S. 976; *Cartier v. Spooner*, 118 App. Div. 342, 103 N. Y. S. 505; *People v. Feenaughty*, 51 Misc. 468, 101 N. Y. S. 700; *Matter of Gardner*, 56 Misc. 272, 106 N. Y. S. 417; *Porter v. Parmly*, 39 Super. Ct. 219; *Sprague v. Horton*, 18 N. Y. S. 165; *In re Klein*, 101 N. Y. S. 663; *In re McIntosh*, 112 N. Y. S. 513.

*Pennsylvania*.—*Clark v. Clark*, 17 W. N. C. 400.

*Rhode Island*.—*Anderson v. Bos-Attys.* at L. Vol. I.—39.

worth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910.

<sup>6</sup> *Anderson v. New York & H. R. Co.*, 150 App. Div. 432, 135 N. Y. S. 36.

<sup>7</sup> *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433; *Emanuel v. Cooper*, 153 Iowa 572, 133 N. W. 1064; *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 58 L.R.A. 471, *reversing* 50 Atl. 659. See also *Downs v. Davis*, 113 Iowa 529, 85 N. W. 781; *In re Dakin*, 4 Hill (N. Y.) 42.

<sup>8</sup> *Indiana*.—See *Dawson v. Compton*, 7 Blackf. 421.

*Mississippi*.—*Banks v. Cage*, 1 How. 293; *Sloan v. Johnson*, 14 Smedes & M. 47; *Lombard v. Whiting*, Walk. 229; *McCreary v. Hoopes*, 25 Miss. 428.

*New York*.—*Matter of Schell*, 58 Hun 440, 12 N. Y. S. 790, *affirmed* 128 N. Y. 67, 27 N. E. 957.

*Ohio*.—*Longworth v. Handy*, 2 Disney 75; *Cotton v. Ashley*, 5 Ohio Cir. Dec. 6, 11 Ohio Cir. Ct. 47.

*Virginia*.—*Taylor v. Armstead*, 3 Call 200. And see the cases cited in the preceding note.

court.<sup>9</sup> There is no distinction between attorneys and counsel in this respect.<sup>10</sup>

**§ 355. Right to Proceed Summarily for Other Purposes. —**

While, as seen in the foregoing section, the right to proceed summarily is most frequently employed as a means to compel the payment over of money collected by an attorney, still, its usefulness is by no means confined to that end; and it is well settled that the court may exercise its summary powers to compel the performance of any other professional duty which counsel owe either to their clients or to the court, and which, in its nature, is one requiring summary action in order to maintain the respect owing to the court, or the integrity due to the client.<sup>11</sup> Thus the court, upon general principles of equity and policy, will always look into the dealings between attorneys and their clients, and guard the latter from any disadvantage resulting from a situation in which the parties stand unequal.<sup>12</sup> Such jurisdiction, however, will always be exercised with great prudence and caution, and a sedulous regard for the rights of the client on the one hand, and of the attorney on the other.<sup>13</sup> A summary proceeding will be sustained in order to enforce the delivery of documents belonging to the client, and which it appears the attorney has no authority to retain.<sup>14</sup> So, on

<sup>9</sup> *Saxton v. Wyckoff*, 6 Paige (N. Y.) 182; *Ackerman v. Ackerman*, 14 Abb. Pr. (N. Y.) 229; *Porter v. Parmly*, 39 Super. Ct. (N. Y.) 234; *In re Schell*, 128 N. Y. 67, 27 N. E. 957, *affirming* 58 Hun 440, 12 N. Y. S. 790; *Keeney v. Tredwell*, 71 App. Div. 521, 75 N. Y. S. 1097; *In re Nellis*, 116 App. Div. 94, 101 N. Y. S. 698; *Hess v. Finck*, 133 App. Div. 654, 118 N. Y. S. 171; *In re Hitchings*, 157 App. Div. 392, 142 N. Y. S. 339.

<sup>10</sup> *Niven's Trial*, 1 Wheel. Crim. (N. Y.) 337 note.

<sup>11</sup> *In re Aitken*, 4 B. & Ald. 47, 6 E. C. L. 384; *Emanuel v. Cooper*, 153 Ia. 572, 133 N. W. 1064; *Kuhne v.*

*Daily*, 23 Hun (N. Y.) 282; *Merritt v. Lambert*, 10 Paige (N. Y.) 352; *Foster v. Townshend*, 68 N. Y. 203; *Robertson v. Clocke*, 18 App. Div. 363, 46 N. Y. S. 87.

<sup>12</sup> *De Rose v. Fay*, 3 Edw. (N. Y.) 369; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275.

As to dealings between attorney and client, see *supra*, §§ 152-182.

<sup>13</sup> *Matter of H—*, 87 N. Y. 521.

<sup>14</sup> *Matter of Wolf*, 51 Hun 407, 4 N. Y. S. 239, *following Matter of H—*, 87 N. Y. 521, and *Matter of Husson*, 26 Hun (N. Y.) 130. And see *Matter of Edward N. y. Co.*, 114 App. Div. 467, 99 N. Y. S. 982.

an allegation of irregularities, summary jurisdiction has been exercised in relation to the entry of judgments by an attorney against his client.<sup>15</sup> A summary proceeding does not lie, however, for injury occasioned by the unauthorized acts or the negligence of an attorney; <sup>16</sup> in such cases the remedy lies elsewhere.<sup>17</sup>

**§ 356. When Right Will Be Exercised.**—While the court will, in a proper case, make a summary order against an attorney to compel the payment over of funds belonging to his client, it will do so only when it cannot reasonably be disputed that there has been misconduct on the part of the attorney,<sup>18</sup> as, for instance, where there is an honest dispute as to the amount of compensa-

<sup>15</sup> *Drapers Co. v. Davis*, 2 Atk. (Eng.) 295; *Starr v. Vanderheyden*, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; *De Rose v. Fay*, 3 Edw. Ch. (N. Y.) 360.

<sup>16</sup> *Lombard v. Whiting*, Walk. (Miss.) 229; *Banks v. Cage*, 1 How. (Miss.) 293.

<sup>17</sup> See *supra*, §§ 333-339.

<sup>18</sup> *England*.—In *re Hulm*, [1892] 2 Q. B. 261.

*United States*.—In *re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *Jeffries v. Laurie*, 23 Fed. 786.

*Alabama*.—*Macdonald v. State*, 143 Ala. 101, 39 So. 257.

*California*.—*Tomsky v. Superior Ct.*, 131 Cal. 620, 63 Pac. 1020.

*Illinois*.—*People v. Ford*, 54 Ill. 520.

*Iowa*.—See *Farrar v. Farrar*, 104 Iowa 621, 74 N. W. 5.

*Kentucky*.—*Thomas v. Roberts*, 5 Dana 189.

*Louisiana*.—*Durnford v. Seghers*, 9 Mart. O. S. 470; *Oakey v. Duncan*, 2 Rob. 349.

*Michigan*.—*Rosenthal v. Dickerman*, 98 Mich. 208, 57 N. W. 112, 39 Am St. Rep. 535, 22 L.R.A. 693.

*Mississippi*.—*Banks v. Cage*, 1 How. 293.

*New Jersey*.—*Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611.

*New York*.—*People v. Brotherson*, 36 Barb. 662; *People v. Smith*, 3 Caines 221; *Gardiner v. Tyler*, 36 How. Pr. 63; *People v. Wilson*, 5 Johns. 368; *Matter of Bleakley*, 5 Paige 311; *Saxton v. Wyckoff*, 6 Paige 182; In *re Martin*, 73 App. Div. 505, 77 N. Y. S. 192; *Matter of Nellis*, 116 App. Div. 94, 101 N. Y. S. 698; In *re Chittenden*, 25 N. Y. Wkly. Dig. 403; *Matter of Forster*, 49 Hun 114, 1 N. Y. S. 619; *Post v. Evarts*, 56 Hun 641 mem., 31 N. Y. St. Rep. 123, 9 N. Y. S. 370; *Matter of Smyley*, 71 Hun 639 mem., 46 N. Y. St. Rep. 824; *Matter of Holland Trust Co.*, 76 Hun 323, 27 N. Y. S. 687; *Berks v. Hotchkiss*, 82 Hun 27, 31 N. Y. S. 16; *Wilmerdings v. Fowler*, 55 N. Y. 641; In *re Knapp*, 85 N. Y. 284.

*Rhode Island*.—*Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201; *Murray v. Lizotte*, 31 R. I. 509, 77 Atl. 231.

*Texas*.—*Trammell v. Shropshire*, 22 Tex. 327.

tion.<sup>19</sup> It is for the court to say when and under what circumstances it will entertain such proceeding against its officers, upon the application of the client, and a refusal to proceed in that way is not the denial of any legal right.<sup>20</sup> In no case should the attorney be summarily compelled to pay over money to his client if it appears that the latter is not, *ex æquo et bono*, entitled to it.<sup>1</sup> But the mere assertion of a counterclaim is not such a dispute as will, of itself, oust the jurisdiction,<sup>2</sup> because the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands.<sup>3</sup> The good faith of the attorney in making such counterclaim is immaterial.<sup>4</sup> Where one member of a

<sup>19</sup> *Hess v. Finck*, 133 App. Div. 654, 118 N. Y. S. 171; *In re Harvey*, 14 Phila. (Pa.) 287, 38 Leg. Int. 204; *In re Robb*, 6 Pa. Co. Ct. 644; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>20</sup> *Brunings v. Townsend*, 139 Cal. 137, 72 Pac. 919.

<sup>1</sup> *Hyman v. Washington*, 2 McCord, L. (S. C.) 493.

*Only Money Collected.*—On a motion against an attorney for refusing to pay over his client's money when demanded, he can only be charged with the amounts he actually collected; and he cannot, in this mode of proceeding, be made liable for failing, through negligence or other cause, to recover for the full amount due his client. *Croft v. Hicks*, 26 Tex. 383. See also *Banks v. Cage*, 1 How. (Miss.) 293.

<sup>2</sup> *Matter of Tracy*, 1 App. Div. 113, 37 N. Y. S. 65, *affirmed* 149 N. Y. 608, 44 N. E. 1129.

<sup>3</sup> *Iowa.*—*Union Bldg., etc., Assoc. v. Soderquist*, 115 Ia. 695, 87 N. W. 433.

*Mississippi.*—*Lombard v. Whiting*, Walk. 229.

*New Jersey.*—*Mundy v. Schantz*, 52 N. J. Eq. 744, 30 Atl. 322.

*New York.*—*In re Knapp*, 85 N. Y. 285; *Matter of Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 163 N. Y. 639, 61 N. E. 1127; *Thomasson v. Latourette*, 63 App. Div. 408, 71 N. Y. S. 559; *Matter of Martin*, 73 App. Div. 505, 77 N. Y. S. 192; *Waterbury v. Eldridge*, 1 Silvernail 292, 52 Hun 614 mem., 5 N. Y. S. 324; *Ackerman v. Wagener*, 55 Hun 608 mem., 5 Silvernail 443, 8 N. Y. S. 457.

*Rhode Island.*—*Burns v. Allen*, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

*Washington.*—*State v. Sachs*, 3 Wash. 371, 28 Pac. 540.

<sup>4</sup> "In *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489, it was held that good faith in the claim made by the attorney for the retention of the money in dispute would be no answer to this proceeding to oblige him to pay it over. Neither is it an answer,

firm of attorneys received plaintiff's money for investment, and, becoming involved, lost the same, although his good faith was not questioned, his partners should not be required by summary motion to pay over to petitioner the amount lost; petitioner having an adequate remedy at law, in which the liability of the parties might be determined.<sup>5</sup>

**§ 357. Professional Relation Must Exist.** — The rule is well settled that courts have no summary jurisdiction over an attorney to compel him to pay over moneys, unless the relation of attorney and client exists between the attorney and the party seeking such summary relief.<sup>6</sup> Nor can the court acquire jurisdiction to proceed summarily against an attorney, even with his express consent, for the nonpayment of a debt contracted by him in any

within this authority, that a dispute may exist between himself and the applicant concerning the fact of his lien or right to retain the money to satisfy a demand claimed to be due to him for the performance of his services. These, on the contrary, are facts which may be well tried in the proceeding itself, and, if they are found upon the proof against the attorney, he may then be obliged . . . to pay over the money to the applicant. This subject was still further considered in *Re Knapp*, 85 N. Y. 285, and the authority of the preceding case was again sanctioned and maintained; and the law, as it has been stated in the opinion delivered in the last case, fully sustained the power of the court over the subject by a summary proceeding against the attorney, and its jurisdiction to settle all disputes arising as to the right to the money in controversy." *Ackerman v. Wagner*, 55 Hun 608 mem., 8 N. Y. S. 457.

<sup>5</sup> *In re Hitchings*, 157 App. Div. 392, 142 N. Y. S. 339.

<sup>6</sup> *England*.—*In re Fenton*, 3 Ad. & El. 404, 30 E. C. L. 129; *Tylee v. Webb*, 14 Beav. 14; *Re Harvey*, 27 Beav. 330; *Ex p. Faith*, 9 Dowl. 973; *Dixon v. Wilkinson*, 4 Drew. 614, 4 De G. & J. 508; *Cocks v. Harman*, 6 East 404; *In re — an Attorney*, 11 Jur. 396; *In re Bryant*, 50 L. T. N. S. 450; *Matter of Lord*, 2 Scott 131, 30 E. C. L. 430. See also *Ex p. Corpus Christi College*, 6 Taunt. 105, 1 E. C. L. 325; *Ex p. Cobeldick*, 12 Q. B. D. 149, 49 L. T. N. S. 741, 32 W. R. 239; *Ex p. Maxwell*, 4 Dowl. 87; *Ex p. Nicholls*, 7 Jur. 374, 12 L. J. Q. B. 103, 2 Dowl. N. S. 423.

*Canada*.—*Matter of Osler*, *Manitoba v. Wood* 205; *Ex p. White Sewing Mach. Co.*, 31 N. Bruns. 237; *Wilson v. Beatty*, 12 Ont. App. 252; *Re McBrady*, 19 Ont. Pr. 37. Compare *Re Carroll*, 2 Ch. Chamb. (Ont.) 323; *Re Walker*, 2 Ch. Chamb. (Ont.) 324.

*Georgia*.—*Haygood v. Haden*, 119 Ga. 463, 46 S. E. 625; *Haden v. Lovett*, 133 Ga. 388, 18 Ann. Cas. 114, 65 S. E. 853.

capacity other than as an officer thereof; <sup>7</sup> for, beyond his professional relations, he would have the same rights as other litigants.<sup>8</sup> If, acting in any other capacity for another, an attorney receives money, the remedy for its nonpayment is by action only.<sup>9</sup> Of course, where his employment is so connected with his professional character as to afford a presumption that his occupation formed the ground of his employment, the court may interfere in a sum-

*Iowa*.—*Downs v. Davis*, 113 Iowa 529, 85 N. W. 781.

*Mississippi*.—*Sloan v. Johnson*, 14 Smedes & M. 47; *McCreary v. Hoopes*, 25 Miss. 428.

*New Jersey*.—*Crane v. Gurnee*, 75 N. J. Eq. 104, 71 Atl. 338; *Koenig v. Harned*, 13 Atl. 236.

*New York*.—In re Langslow, 167 N. Y. 314, 60 N. E. 590; In re Niagara, etc., Power Co., 203 N. Y. 493, Ann. Cas. 1913B 234, 97 N. E. 33, 38 L.R.A.(N.S.) 207; *Matter of Hillebrandt*, 33 App. Div. 191, 53 N. Y. S. 352; *Taylor v. Long Island R. Co.*, 38 App. Div. 595, 56 N. Y. S. 665; *Matter of Cattus*, 42 App. Div. 134, 59 N. Y. S. 55; *Matter of Redmond*, 54 App. Div. 454, 66 N. Y. S. 782; *Matter of Neville*, 71 App. Div. 102, 75 N. Y. S. 588; *Matter of Hirshbach*, 72 App. Div. 79, 76 N. Y. S. 117; *Matter of Edward Ney Co.*, 114 App. Div. 467, 99 N. Y. S. 982; *Minnesota Phonograph Co. v. Tomlinson*, 148 App. Div. 56, 132 N. Y. S. 1063; In re Hammann, 37 Misc. 417, 75 N. Y. S. 775; *People v. Feenaughty*, 51 Misc. 468, 101 N. Y. S. 700; In re Dakin, 4 Hill 42; In re Haskin, 18 Hun 43; In re Husson, 26 Hun 130; *Matter of Schell*, 58 Hun 440, 12 N. Y. S. 790, *appeal dismissed* 128 N. Y. 67, 27 N. E. 957; *Matter of Sardy*, 65 Hun 619 mem., 19 N. Y. S. 575; *Bowen v. Smidt*, 66 Hun 627 mem., 20 N. Y. S. 735; *Hess v. Joseph*, 7 Robt. 609.

See *Burr's Case*, 1 Wheel. Crim. 513. See also *Bohanan v. Peterson*, 9 Wend. 503.

*Ohio*.—*Longworth v. Handy*, 2 Disney 75.

*Pennsylvania*.—In re Kennedy, 120 Pa. St. 497, 14 Atl. 397, 6 Am. St. Rep. 724.

*Rhode Island*.—*Windsor v. Brown*, 15 R. I. 182, 9 Atl. 135, 2 Am. St. Rep. 892.

<sup>7</sup> In re Langslow, 167 N. Y. 314, 60 N. E. 590, *modifying* 52 App. Div. 635, 66 N. Y. S. 1135; In re Hitchings, 157 App. Div. 392, 142 N. Y. S. 339.

<sup>8</sup> *Georgia*.—*Haden v. Lovett*, 133 Ga. 388, 18 Ann. Cas. 114, 65 S. E. 853.

*New Jersey*.—*Crane v. Gurnee*, 75 N. J. Eq. 104, 71 Atl. 338; *Koenig v. Harned*, 13 Atl. 236.

*New York*.—In re Haskin, 18 Hun 43; *Re Niagara, L. & O. Power Co.*, 203 N. Y. 493, Ann. Cas. 1913B 234, 97 N. E. 33, 38 L.R.A.(N.S.) 207; In re Edward Ney Co., 114 App. Div. 467, 99 N. Y. S. 982.

*Rhode Island*.—*Murray v. Lizotte*, 31 R. I. 509, 77 Atl. 231.

*Texas*.—*Trammell v. Shropshire*, 22 Tex. 327.

*Utah*.—*Snelson v. Pickard*, 18 Utah 436, 56 Pac. 89.

<sup>9</sup> In re Langslow, 167 N. Y. 314, 60 N. E. 590, *modifying* 52 App. Div. 635, 66 N. Y. S. 1135; *Emanuel v.*



mary way to compel him faithfully to execute the trust reposed in him;<sup>10</sup> nor does the mere fact that the professional relation is denied by the attorney, deprive the court of jurisdiction to proceed summarily.<sup>11</sup> This subject has also been considered in connection with the treatment of dealings between attorney and client.<sup>12</sup>

**§ 358. Institution of Proceeding.** — The proceeding is a special one,<sup>13</sup> addressed to the judicial discretion,<sup>14</sup> and it is for the court to say under what circumstances it will be entertained.<sup>15</sup> The usual practice is to present a verified<sup>16</sup> petition asking for a rule to show cause directed to the attorney and commanding him to appear at a certain time to answer the charges presented,<sup>17</sup> the result sought being an adjudication.<sup>18</sup> In some jurisdictions, however, the practice is regulated by statute, and the local laws must be consulted.<sup>19</sup> Under any form of practice the original petition must contain every fact essential to the exercise of summary ju-

Cooper, 153 Ia. 572, 133 N. W. 1064. And see note to Burns v. Allen, 2 Am. St. Rep. 844.

<sup>10</sup> *England*.—Matter of Lord, 2 Scott 131, 30 E. C. L. 430; Matter of Aitkin, 4 B. & Ald. 47, 6 E. C. L. 384; In re Carroll, [1902] 2 Ch. 175; In re Grey, [1892] 2 Q. B. 440; Ex p. Hales, [1907] 2 K. B. 539. See also In re Hilliard, 9 Jur. 664, 2 Dowl. & L. 919; In re Fairthorne, 10 Jur. 287.

*Alabama*.—Boyett v. Payne, 141 Ala. 475, 37 So. 585.

*New York*.—In re Husson, 26 Hun 133; Ex p. Statte, 4 Cow. 76; In re Dakin, 4 Hill 42; Grant's Case, 8 Abb. Pr. 357; Matter of Edward Ney Co., 114 App. Div. 467, 99 N. Y. S. 982; In re Dey, 156 App. Div. 864, 142 N. Y. S. 62; In re Hammann, 37 Misc. 417, 75 N. Y. S. 775; People v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; In re McIntosh, 112 N. Y. S. 513.

<sup>11</sup> State v. Morgan, 80 Iowa 413, 45 N. W. 1070.

<sup>12</sup> See *supra*, §§ 153, 172.

<sup>13</sup> Union Bldg. & Sav. Assoc. v. Soderquist, 115 Iowa 695, 87 N. W. 433.

<sup>14</sup> See *supra*, § 354 note.

<sup>15</sup> Keeney v. Tredwell, 71 App. Div. 521, 75 N. Y. S. 1097.

<sup>16</sup> In re Curtia, 51 App. Div. 434, 64 N. Y. S. 691.

<sup>17</sup> Union Bldg. & Sav. Assoc. v. Soderquist, 115 Iowa 695, 87 N. W. 433; Merritt v. Lambert, 10 Paige (N. Y.) 352; Rose v. Whiteman, 52 Misc. 210, 101 N. Y. S. 1024; Taylor v. Armstead, 3 Call (Va.) 200.

<sup>18</sup> Union Bldg. & Sav. Assoc. v. Soderquist, 115 Ia. 695, 87 N. W. 433.

<sup>19</sup> See Macdonald v. State, 143 Ala. 101, 59 So. 257; McCarley v. White, 144 Ala. 662, 39 So. 978; Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281; West v. Carleton, 8 La. 253.

risdiction.<sup>20</sup> The petition may, of course, be amended under the usual practice rules.<sup>1</sup> The proceeding may be instituted in the court of which the attorney is an officer,<sup>2</sup> or in any court wherein his misconduct was perpetrated;<sup>3</sup> but a state court will not pro-

<sup>20</sup> *Alabama*.—*McCarley v. White*, 144 Ala. 662, 39 So. 978.

*Iowa*.—*Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433.

*New York*.—*Matter of Curtis*, 51 App. Div. 434, 64 N. Y. S. 691; *People v. Feenaughty*, 51 Misc. 468, 101 N. Y. S. 700; *Rose v. Whiteman*, 52 Misc. 210, 101 N. Y. S. 1024; *In re Klein*, 101 N. Y. S. 663.

*Texas*.—*Croft v. Hicks*, 26 Tex. 383.

*Money Must Have Been Wrongfully Withheld*.—An allegation that the defendant received money sued for as an attorney, does not necessarily make his refusal to pay it over wrongful; to have such effect the complaint should contain allegations charging that defendant wrongfully withholds the money. *Gopen v. Crawford*, 53 How. Pr. (N. Y.) 278.

*Necessary to Charge Dishonesty and Oppressiveness*.—The misconduct relied on as grounds for summary proceedings must be dishonest, oppressive, or illegal. *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611; *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952.

*What Is Dishonesty*.—False, exorbitant, and unreasonable charges made by an attorney constitute such dishonest, oppressive, and illegal conduct as will authorize summary proceedings against him. *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952.

<sup>1</sup> *McMath v. Com.*, 12 Ky. L. Rep. 251.

<sup>2</sup> *In re Lord*, 2 Scott 131, 30 E. C.

L. 430, 1 Hodges 195; *Pole v. Groves*, 4 Jur. (Eng.) 339, 1 Scott N. R. 30; *Thomas v. Roberts*, 5 Dana (Ky.) 189.

*At his residence*, unless proceeding out of which default arose is pending elsewhere. *Emanuel v. Cooper*, 153 Ia. 572, 133 N. W. 1064.

*Where only one member of a firm has been admitted in the court*, and there is a neglect of duty on the part of the firm, the court has no summary jurisdiction except as to the member who has been admitted. *Cheshire v. Tyler*, 7 Jur. (Eng.) 704.

*Change of venue* is not available in summary proceedings against attorneys. *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433.

<sup>3</sup> *Thompson v. Gordon*, 4 Dowl. & L. (Eng.) 49, 15 M. & W. 610, 15 L. J. Exch. 344; *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Ia. 695, 87 N. W. 433.

Where alimony decreed by a court of chancery in New Jersey is collected by legal proceedings in New York by the same attorney who conducted the alimony proceedings, such attorney being a solicitor in chancery in New Jersey and also an attorney at law in New York, the *New Jersey* Court of Chancery has jurisdiction of summary proceedings to compel him to account to his client for the money so collected. *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 97 Am. St. Rep. 692, 58 L.R.A. 471.

ceed summarily to compel an attorney to pay over money which he collected while practicing in a federal court.<sup>4</sup> The petition is presented as an independent proceeding,<sup>5</sup> and the pendency of any other proceeding is not essential.<sup>6</sup> A traverse of an attorney's answer to a money rule may be filed at any time before the rule is discharged.<sup>7</sup>

**§ 359. Parties.** — The proceeding must, of course, be brought on behalf of the client,<sup>8</sup> or his agent,<sup>9</sup> or executor or administrator.<sup>10</sup> But where an attorney collects separate claims belonging to different persons, they cannot unite in one summary proceeding against him.<sup>11</sup> Where a judgment recovered for a client by a firm of attorneys is paid to one of the partners, who appropriates the proceeds to his own use, it is not necessary to join the other partners,<sup>12</sup> though it is permissible and, possibly, advisable to do so.<sup>13</sup>

**§ 360. Evidence.** — In summary proceedings against attorneys, the evidence on the hearing must be such as is admissible in civil

<sup>4</sup> *Attorney Practicing in the Federal Courts.*—In *Thomas v. Roberts*, 5 Dana (Ky.) 189, it was said: "We know of no law authorizing such a summary proceeding against an attorney of the federal court. . . . We should not presume that the state legislature intended to legislate for the federal court, or to provide a summary remedy, in a state court, for enforcing the responsibilities of attorneys who, having collected money for their clients in virtue of process from the federal court, are amenable to that tribunal for their professional conduct under its authority." And see to the same effect *Matter of Forster*, 49 Hun 144, 1 N. Y. S. 619.

<sup>5</sup> *Hess v. Joseph*, 7 Robt. (N. Y.) 609. Compare *Grangier v. Hughes*, 56 Super. Ct. 349, 3 N. Y. S. 828; *Ex p. Ketchum*, 4 Hill (N. Y.) 564.

<sup>6</sup> *Emanuel v. Cooper*, 153 Ia. 572, 133 N. W. 1064.

<sup>7</sup> *Lane v. Brinson*, 12 Ga. App. 760, 78 S. E. 725.

<sup>8</sup> *Colorado.*—*Ex p. Browne*, 2 Colo. 553.

*Illinois.*—*People v. Allison*, 68 Ill. 151.

*Kentucky.*—*Board of Education v. Allin*, 134 Ky. 763, 121 S. W. 676.

*Mississippi.*—*Sloan v. Johnson*, 14 Smedes & M. 47.

*New York.*—*Hess v. Joseph*, 7 Robt. 609.

<sup>9</sup> *De Woolfe v. —*, 2 Chit, 68, 18 E. C. L. 251.

<sup>10</sup> *Trammell v. Shropshire*, 22 Tex. 327.

<sup>11</sup> *In re Forster*, 49 Hun 114, 1 N. Y. S. 619.

<sup>12</sup> *In re Wolf*, 51 Hun 407, 4 N. Y. S. 239.

<sup>13</sup> *Nodine v. Hannum*, 1 Alaska 302.

actions.<sup>14</sup> *Ex parte* affidavits are inadmissible.<sup>15</sup> The respondent is entitled to the privilege of cross-examining the witnesses produced to testify against him.<sup>16</sup> As the judgment may conclude the rights of the attorney without the ordinary procedure in legal controversies, it is essential that the petitioner should establish his cause to the entire satisfaction of the court.<sup>17</sup> And where a demand is a prerequisite to the institution of a proceeding of this nature,<sup>18</sup> the fact that such demand was made must be shown.<sup>19</sup> It is competent for a petitioning assignee of a claim to show that his assignor directed the attorney to turn over the fund to the petitioner.<sup>20</sup> Under the ordinary equity practice the respondent's answer would be evidence in his behalf in so far as it was responsive to the petition;<sup>1</sup> where this practice does not prevail, however, the answer would not have this effect.<sup>2</sup> The attorney may be, and doubtless would be, permitted to show such mitigating circumstances as would have a tendency to exonerate him from proceedings for his punishment,<sup>3</sup> and he is entitled to introduce all proper evidence as to the value of his services where he claims therefor against the amount withheld.<sup>4</sup>

§ 361. *Hearing.* — The hearing of summary proceedings rests entirely with the court.<sup>5</sup> Where there appears to be any good reason therefor, a reference may be ordered merely to take proof and report thereon;<sup>6</sup> but judgment cannot be entered on such report

<sup>14</sup> *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433.

<sup>15</sup> *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433.

<sup>16</sup> *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>17</sup> *Barker's Case*, 49 N. H. 195; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>18</sup> See *supra*, § 346.

<sup>19</sup> *Macdonald v. State*, 143 Ala. 101, 39 So. 257.

<sup>20</sup> *Boyett v. Payne*, 141 Ala. 475, 37 So. 585. But see *supra*, § 357.

<sup>1</sup> *Foster v. Reid*, 58 Ga. 221; 1 Street's Fed. Eq. Pr. §§ 716-718.

<sup>2</sup> *State v. Morgan*, 80 Iowa 413, 45 N. W. 1070.

<sup>3</sup> *Dawson v. Compton*, 7 Blackf. (Ind.) 421.

<sup>4</sup> *Boyett v. Payne*, 141 Ala. 475, 37 So. 585.

<sup>5</sup> *In re Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127; *Cartier v. Spooner*, 118 App. Div. 342, 103 N. Y. S. 505; *Peirce v. Palmer*, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>6</sup> *In re Knapp*, 85 N. Y. 285;

until it has been confirmed by the court.<sup>7</sup> Neither party is entitled to a reference;<sup>8</sup> and even though one has been ordered, the court may adopt or disregard the referee's findings, and render an entirely different decision on the facts.<sup>9</sup> The finding of the court is entitled to the same presumption that prevails as to the verdict of a jury; and the case is triable on review on errors assigned, and not *de novo*.<sup>10</sup>

§ 362. **Defenses.** — The fact that the proceeding is a summary one does not deprive the attorney of any defense which he might have asserted in an action at law, or in a suit in equity, instituted for the same end.<sup>11</sup> Thus he may set up that the money retained by him was honestly due as compensation for his services,<sup>12</sup> or

Matter of Wolf, 51 Hun 407, 4 N. Y. S. 239; Taylor Iron & Steel Co. v. Higgins, 66 Hun 626 mem., 20 N. Y. S. 746, *appeal dismissed* 137 N. Y. 605, 33 N. E. 744; Matter of Raby, 29 App. Div. 225, 51 N. Y. S. 552; In re Ernst, 54 App. Div. 363, 66 N. Y. S. 620; In re Martin, 73 App. Div. 505, 77 N. Y. S. 192; Luikert v. Luikert, 102 App. Div. 53, 92 N. Y. S. 97; Gillespie v. Mulholland, 12 Misc. 40, 33 N. Y. S. 33, *affirming* 8 Misc. 511, 28 N. Y. S. 754; In re Hammann, 37 Misc. 417, 75 N. Y. S. 775; Rose v. Whiteman, 52 Misc. 210, 101 N. Y. S. 1024.

<sup>7</sup> Cartier v. Spooner, 118 App. Div. 342, 103 N. Y. S. 505.

*The court cannot delegate any of its authority to the committee on complaints. Its report is of assistance to the court in deciding whether to take action on charges or to leave complainants to their remedies at law, but its report can never be used as the basis of an order against an attorney. A summary order should be made only after the parties and witnesses have appeared and given*

their sworn testimony before the court. Peirce v. Palmer, 31 R. I. 432, Ann. Cas. 1912B 181, 77 Atl. 201.

<sup>8</sup> Waterbury v. Eldridge, 52 Hun 614 mem., 5 N. Y. S. 324; Ferdon v. Ferdon, 1 App. Div. 629 mem., 36 N. Y. S. 741; In re Borkstrom, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127.

<sup>9</sup> Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572; Matter of Edward Ney Co., 114 App. Div. 467, 99 N. Y. S. 982; Jones & Co. v. Gilbert, 117 App. Div. 775, 102 N. Y. S. 983; Cartier v. Spooner, 118 App. Div. 342, 103 N. Y. S. 505. See also In re Steinert, 24 Hun (N. Y.) 246.

<sup>10</sup> Union Bldg. & Sav. Assoc. v. Soderquist, 115 Ia. 695, 87 N. W. 433.

<sup>11</sup> White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568; Dunn v. Vannerson, 7 How. (Miss.) 579; Matter of Fincke, 6 Daly (N. Y.) 111; Jones v. Miller, 1 Swan (Tenn.) 151.

<sup>12</sup> Iowa.—Emanuel v. Cooper, 153 Ia. 572, 133 N. W. 1064.

New Jersey.—Strong v. Mundy, 52 N. J. Eq. 833, 31 Atl. 611.

that the fund was garnished in his hands,<sup>13</sup> or that the fund has been assigned by the client,<sup>14</sup> or the statute of limitations,<sup>15</sup> or that he has a valid set-off thereagainst.<sup>16</sup> So, also, he may allege another suit pending against him which was brought by the moving party in the summary proceeding, and which involves the same questions as are involved therein,<sup>17</sup> or that a judgment has been recovered against him in such an action;<sup>18</sup> but where it appears

*New York*.—Matter of Forster, 49 Hun 114, 1 N. Y. S. 619; Matter of Holland Trust Co., 76 Hun 323, 27 N. Y. S. 687; McKibbin v. Nafis, 76 Hun 344, 27 N. Y. S. 723; In re Sweeney, 86 App. Div. 547, 83 N. Y. S. 680; Cartier v. Spooner, 118 App. Div. 342, 103 N. Y. S. 505; In re Klein, 101 N. Y. S. 663.

*Pennsylvania*.—In re Harvey, 14 Phila. 287, 38 Leg. Int. 204.

*Rhode Island*.—Burns v. Allen, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

*Texas*.—Croft v. Hicks, 26 Tex. 383.

*Vermont*.—Patrick v. Hazen, 10 Vt. 183.

<sup>13</sup> Ewing v. Freeman, 103 Ga. 811, 30 S. E. 637. And see *supra*, § 301.

<sup>14</sup> Bowen v. Smidt, 66 Hun 627 mem., 20 N. Y. S. 735.

<sup>15</sup> Fortune v. English, 226 Ill. 262, 9 Ann. Cas. 77, 80 N. E. 781, 117 Am. St. Rep. 253, 12 L.R.A.(N.S.) 1005; People v. Brotherson, 36 Barb. (N. Y.) 662; Goodyear Metallic Rubber Co. v. Baker, 81 Vt. 39, 15 Ann. Cas. 1207, 69 Atl. 160, 17 L.R.A.(N.S.) 667.

As to when the statute begins to run, see *supra*, §§ 342, 351.

<sup>16</sup> *United States*.—In re Paschal, 10 Wall. 483, 19 U. S. (L. ed.) 992.

*Iowa*.—Union Bldg. & Sav. Assoc. v. Soderquist, 117 Iowa 695, 87 N. W. 433.

*New York*.—Matter of Mertiam, 29

Hun 459; Taylor Iron, etc., Co. v. Higgins, 66 Hun 626 mem., 20 N. Y. S. 746; Matter of Holland Trust Co., 76 Hun 323, 27 N. Y. S. 687; McKibbin v. Nafis, 76 Hun 344, 27 N. Y. S. 723; In re Klein, 101 N. Y. S. 663.

*Pennsylvania*.—In re Kennedy, 120 Pa. St. 497, 14 Atl. 397, 6 Am. St. Rep. 724; In re Harvey, 14 Phila. 287, 38 Leg. Int. 204.

*Rhode Island*.—Burns v. Allen, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

*South Carolina*.—Hynman v. Washington, 2 McCord L. 493.

*Contra in Alabama*.—Macdonald v. State, 143 Ala. 101, 39 So. 257.

<sup>17</sup> Dean v. Bigelow, 19 D. C. 570, 19 Wash. L. Rep. 225; Cottrell v. Finlayson, 4 How. Pr. (N. Y.) 242. See also Com. v. McKay, (Ky.) 20 S. W. 276; Van Tassel v. Van Tassel, 31 Barb. (N. Y.) 439; People v. Brotherson, 36 Barb. (N. Y.) 662; Bohanan v. Peterson, 9 Wend. (N. Y.) 503.

*Compare* Coopwood v. Baldwin, 25 Miss. 129, wherein it was said: "We do not think the proceedings on the motion against plaintiff in error, for money collected as an attorney, are a bar to a recovery in an action on the case for damages, resulting from his unauthorized and illegal action in dismissing the suit."

<sup>18</sup> Union Slaughterhouse, etc., Co. v. Crescent City Live Stock Landing,

that such a judgment is ineffectual, that is, when an execution thereon has been returned unsatisfied, it has been held that a summary proceeding may be maintained.<sup>19</sup> The fact that the client has a legal remedy for the recovery of the money does not constitute a defense,<sup>20</sup> nor does the fact that he has given the client secured notes for the amount due.<sup>1</sup> Neither can the attorney defend on the ground that he has been disbarred prior to the institution of the proceeding,<sup>2</sup> or that he has voluntarily resigned his office as an attorney.<sup>3</sup>

### § 363. Merit and Good Faith Must Be Shown in Defense.

—In the presentation of his defense, in a summary proceeding, the respondent must show not only that it is meritorious, but also

etc., Co., 41 La. Ann. 355, 6 So. 508; *Ex p. White Sewing Mach. Co.*, 31 N. Bruns. 237.

*Compare In re Grey* [1892] 2 Q. B. (Eng.) 440; *Gabriel v. Schillinger Fire Proof Cement & Asphalt Co.*, 24 Misc. 313, 6 N. Y. Ann. Cas. 1, 52 N. Y. S. 1127.

<sup>19</sup> *In re Grey*, [1892] 2 Q. B. (Eng.) 440, wherein it was said that "the true way of dealing with this case is to deal with it according to the principle which was laid down in *Re Freston*, 11 Q. B. D. (Eng.) 545, and recognized and approved of in *Re Dudley*, 12 Q. B. D. (Eng.) 44. The principle so laid down is that the court has a punitive and disciplinary jurisdiction over solicitors, as being officers of the court, which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honorable conduct on the part of the court's own officers. That power of the court is quite distinct from any legal rights or remedies of the parties, and cannot, therefore, be affected by anything

which affects the strict legal rights of the parties. . . . So, if a solicitor obtains money by process of law for his client, quite irrespective of any legal liability which may be enforced against him by the client, he is bound, in performance of his duty as a solicitor, to hand it over to the client, unless he has a valid claim against it. If he spends it, or if, still having it, he refuses to hand it over, he commits an offense as an officer of the court, which offense has nothing to do with any legal right or remedy of the client." Quoted with approval in *Gabriel v. Schillinger Fire Proof, etc., Co.*, 24 Misc. 313, 6 N. Y. Ann. Cas. 1, 52 N. Y. S. 1127.

<sup>20</sup> *Union Bldg. & Sav. Assoc. v. Soderquist*, 115 Iowa 695, 87 N. W. 433.

<sup>1</sup> *Bullock v. Angleman*, (N. J.) 87 Atl. 627.

<sup>2</sup> *Matter of Burnham*, 58 Misc. 576, 109 N. Y. S. 988.

<sup>3</sup> *Simes v. Gibbs*, 2 Jur. (Eng.) 418, 6 Dowl. 310, 1 W. W. & H. 40.

that it is made in perfect good faith.<sup>4</sup> In this connection the principles heretofore discussed in considering dealings between attorney and client generally, should be consulted.<sup>5</sup> In a proceeding against one member of a firm to recover moneys paid to him in satisfaction of a judgment, it is no defense that the other member was employed by the client and secured the judgment.<sup>6</sup> Nor can an attorney successfully defend on the theory that his retention of the fund is in good faith, where the client is entitled to it.<sup>7</sup> Where an attorney directs the payment of money to a third person, he will not be permitted to claim, in opposition to the proceeding to compel him to pay it over, that he did not receive it.<sup>8</sup> Nor can an attorney discharge himself by setting up a contract with his client, appropriating the claim upon which the collection was made, to an indebtedness to him which would otherwise be barred by the statute of limitations, especially where the other party to such contract is dead.<sup>9</sup> So, where a claim was given to a firm, and part thereof was collected by one of the partners after the firm had been dissolved, he cannot set up, as a defense to rule upon him to pay it over, an indebtedness owing to him by the other partner.<sup>10</sup> Nor can an attorney who receives money for his client defend on the theory that the money should have been paid, in the first instance, to some one else.<sup>11</sup>

**§ 364. The Order and Its Enforcement.** — If the evidence is insufficient, the usual practice is to enter an order denying the motion or, in some instances, dismissing the petition;<sup>12</sup> but if, after

<sup>4</sup> In re Bolles, 78 App. Div. 180, 79 N. Y. S. 530.

<sup>5</sup> See *supra*, §§ 152-182.

<sup>6</sup> In re Wolf, 51 Hun 407, 4 N. Y. S. 239.

<sup>7</sup> In re Fincke, 6 Daly (N. Y.) 111; Bowling Green Sav. Bank v. Todd, 52 N. Y. 489; In re Wolf, 51 Hun 407, 4 N. Y. S. 239; In re Chittenden, 25 N. Y. Wkly. Dig. 403.

<sup>8</sup> Kent v. Rockwell, 89 Hun 88, 34 N. Y. S. 1041.

<sup>9</sup> Foster v. Reid, 58 Ga. 221.

<sup>10</sup> Jeffries v. Laurie, 23 Fed. 786.

See also In re Wolf, 51 Hun 407, 4 N. Y. S. 239.

<sup>11</sup> In re Silvernail, 45 Hun 575, 10 N. Y. St. Rep. 588. See also Steele v. Gunn, 49 Hun 610 mem., 3 N. Y. S. 692.

<sup>12</sup> In New York an order denying a motion to compel an attorney to pay over moneys collected by him for the petitioners should provide that the order shall not be a bar to any action by them against the attorney to recover the money. Shanley v. McManus, 124 App. Div. 935, 109 N. Y.



hearing the proofs presented, the court is convinced that the attorney should turn over money to his client, or do or perform any other act, it will enter an order to that effect.<sup>13</sup> An order will not be entered on a referee's report unless the evidence and the findings reported by him warrant such action;<sup>14</sup> thus, where the object of the proceeding is to compel an attorney to turn over money, it must appear to the satisfaction of the court that the attorney received the money for his client while acting in his professional capacity;<sup>15</sup> that the same was demanded by the client or his authorized representative, when such preliminary request is essential,<sup>16</sup> and that the attorney unjustifiably refused to comply with such demand.<sup>17</sup> The order usually provides for the payment, within a specified time, of the amount due,<sup>18</sup> with interest thereon;<sup>19</sup> though in some jurisdictions, under statutory regulation, a penalty may be added.<sup>20</sup> The order, when duly entered and served, is usually enforced by procuring an order to show cause why an attachment shall not issue, and, on the return thereof, if no good cause be presented, the attachment issues as a matter of course;<sup>1</sup>

S. 434, *modifying* 57 Misc. 8, 107 N. Y. S. 913.

Where the court, in entering an order, proceeds on an erroneous assumption of fact, as shown by its opinion, the appellate court may dismiss the proceedings without prejudice. *Matter of Pollock*, 69 App. Div. 499, 74 N. Y. S. 976.

<sup>13</sup> *People v. Feenaughty*, 51 Misc. 468, 101 N. Y. S. 700.

<sup>14</sup> *McCarley v. White*, 154 Ala. 295, 45 So. 155; *Matter of Gardner*, 56 Misc. 272, 106 N. Y. S. 417.

<sup>15</sup> See *supra*, § 357.

<sup>16</sup> See *supra*, § 346.

<sup>17</sup> See generally *supra*, §§ 326-330.

<sup>18</sup> *Langmade v. Glenn*, 57 Ga. 525; *In re Peterson*, 74 Hun 93, 26 N. Y. S. 405; *Croft v. Hicks*, 26 Tex. 383.

<sup>19</sup> *In re Wolf*, 51 Hun 407, 4 N. Y. S. 239.

<sup>20</sup> *Hawkins v. Smith*, 56 Ga. 571;

*Dawson v. Compton*, 7 Blackf. (Ind.) 421; *Sloan v. Johnson*, 14 Smedes & M. (Miss.) 47; *Taylor v. Armstead*, 3 Call (Va.) 200.

<sup>1</sup> *Smith v. Bush*, 58 Ga. 121; *People v. Brotherson*, 36 Barb. (N. Y.) 662; *People v. Smith*, 3 Caines (N. Y.) 221, Col. & C. Cas. 497; *People v. Wilson*, 5 Johns. (N. Y.) 368; *Denton v. Noyes*, 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; *Bohanan v. Peterson*, 9 Wend. (N. Y.) 503; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489. See also *Cottrell v. Finlayson*, 4 How. Pr. (N. Y.) 242, 2 Code Rep. 116.

*Laches*.—An attachment was refused in proceedings instituted against an attorney for money collected and not paid over by him, when six years had elapsed since the demand for such money. *People v. Brotherson*, 36 Barb. (N. Y.) 662.

but it must appear that the money has been demanded before the order to show cause will be allowed.<sup>2</sup> The order may also be enforced by contempt proceedings;<sup>3</sup> and imprisonment under such proceedings is not an imprisonment for debt.<sup>4</sup> So, also, the order may be enforced by removal from office.<sup>5</sup> A New York statute provides that a court of record has power to punish, by fine and imprisonment, or either, an attorney for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.<sup>6</sup>

<sup>2</sup> Ex p. Ferguson, 6 Cow. (N. Y.) 596; Cottrell v. Finlayson, 4 How. Pr. (N. Y.) 242, 2 Code Rep. 116.

<sup>3</sup> Smith v. McLendon, 59 Ga. 523; People v. Nevins, 1 Hill (N. Y.) 154; In re Bleakley, 5 Paige (N. Y.) 311; Steele v. Gunn, 49 Hun 610 mem., 3 N. Y. S. 692; Matter of McBride, 6 App. Div. 376, 39 N. Y. S. 579; Cartier v. Spooner, 118 App. Div. 342, 103 N. Y. S. 505.

<sup>4</sup> Smith v. McLendon, 59 Ga. 523.

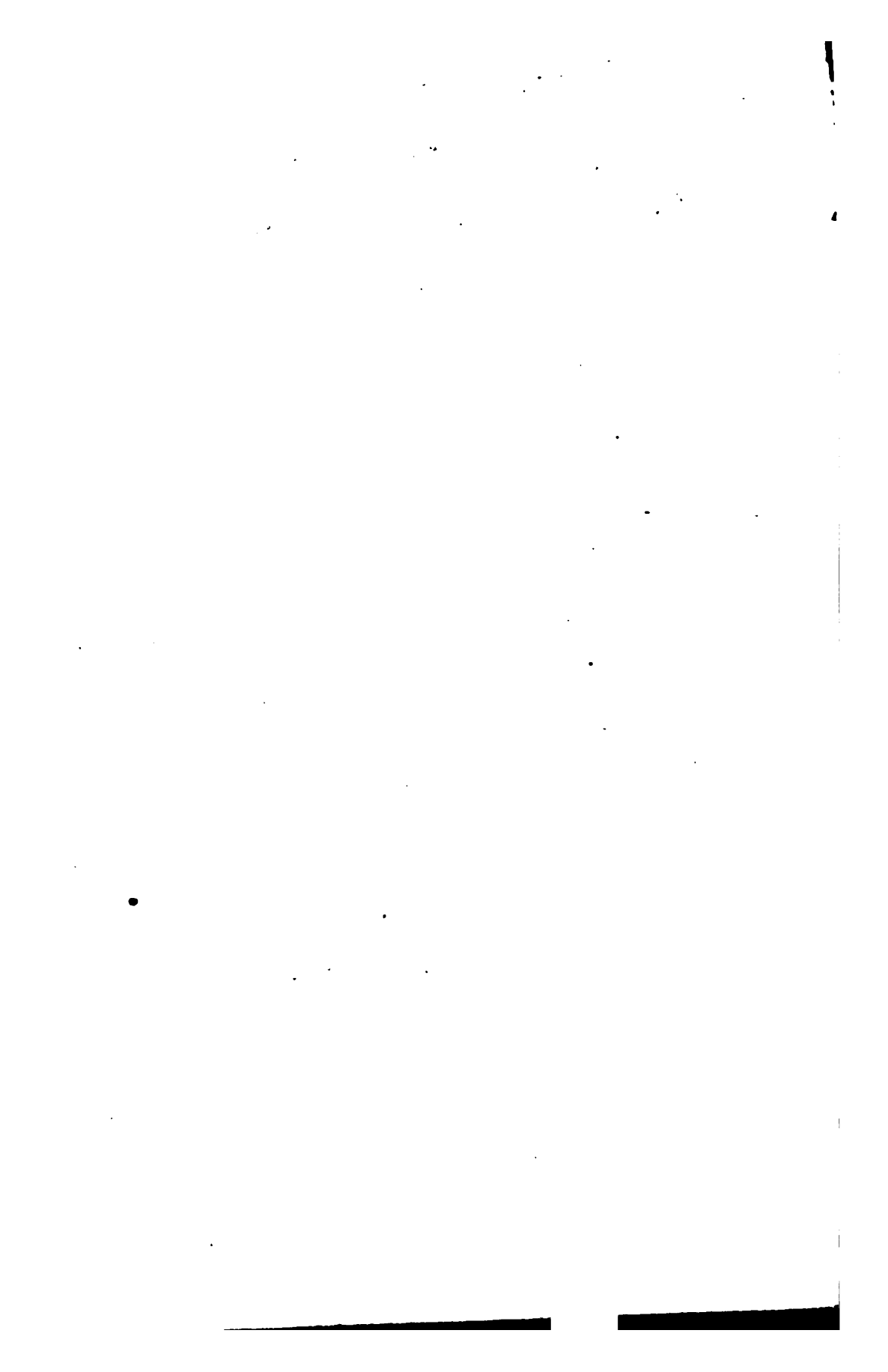
<sup>5</sup> Jeffries v. Laurie, 23 Fed. 786, 27 Fed. 195; In re Bleakley, 5 Paige (N. Y.) 311. And see *infra*, § 804 et seq.

<sup>6</sup> § 753 N. Y. Judiciary Law. See also People v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Matter of Gardner, 56 Misc. 272, 106 N. Y. S. 417.









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